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IN THE

Supreme Court of the United States

FRIENDS OF GATEWAY, EDUCATORS OF GATEWAY, FLOYD BENNETT FIELD GARDENS ASSOCIATION,

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, JANE GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Second Circuit err in deciding that the installation of a Terminal Doppler Weather Radar within the Gateway National Recreation Area does not violate the express statutory language of 16 U.S.C. § 460cc 2(e), prohibiting the expansion of "air facilities" at this recreational site.

PARTIES BELOW

Friends of Gateway is an organization of park users dedicated to protecting and improving the park, as well as enhancing public awareness of and access to the park.

Educators for Gateway (EFG) is an organization of teachers and educators who utilize the park's natural resources for environmental education. The group's main goal is to support the Gateway Environmental Study Center Throughout the year EFG sponsors programs and workshops for teachers at the park. EFG, in conjunction with the New York City Board of Education, also runs a program that brings children to the park for an overnight camping and educational experience.

The Floyd Bennett Gardens Association maintains the largest community garden in the United States on land within Floyd Bennett Field, which is adjacent to the site proposed for the TDWR. The garden plots in this five acre site are tended by more than 400 members during the growing seasons.

The members of these organizations regularly and frequently use Gateway National Recreation Area and are directly and substantially impacted by the construction and operation of a Terminal Doppler Weather Radar on its parklands.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit was filed on July 9, 2001. *Friends of Gateway v. Slater*, No. 99-4081 (2d Cir., filed July 9, 2001). This decision is provided in the Appendix to this petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the Court of Appeals was entered on July 09, 2001. Additionally, the jurisdiction of this Court is invoked under the Court's Rule 10(a); the Court of Appeals in this matter has departed from the accepted and usual course of judicial proceedings by entering a judgment that unequivocally contradicts the well established rule of law as previously decided by this Court.

STATUTORY PROVISIONS

16 U.S.C. § 460cc(a)(1) (2000):

> **§ 460cc. Establishment**
> In order to preserve and protect for the use and enjoyment of present and future generations an area possessing outstanding natural and recreational features, the Gateway National Recreation Area (hereinafter referred to as the "recreation area") is hereby established.
>
> **(a) Composition and boundaries**
> The recreation area shall comprise the following lands, waters, marshes, and submerged lands in the New York Harbor area generally depicted on the map entitled "Boundary Map, Gateway National

Recreation Area," numbered 951-40017 sheets 1 through 3 and dated May, 1972:

(1) Jamaica Bay Unit – including all islands, marshes, hassocks, submerged lands, and waters in Jamaica Bay, Floyd Bennett Field, the lands generally located between highway route 27A and Jamaica Bay and the area of Jamaica Bay up to the shoreline of John F. Kennedy International Airport.

(e) Airway facilities; maintenance, operation, and installation; Jamaica Bay and Floyd Bennett Field restrictions

The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, that nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

49 U.S.C. § 44501(a) (2000):

> **(a) Long range plans and policy requirements.**—The Administrator of the Federal Aviation Administration shall make long range plans and policy for the orderly development and use of the navigable airspace and the orderly development and location of air navigation facilities, that will best meet the need of, and serve the interests of, civil aeronautics and the national defense, except for the needs of the armed forces that are peculiar to air warfare and primarily of military concern.

49 U.S.C. § 44502(a)(1) (2000):

> **(a) General authority.**—(1) The Administrator of the Federal Aviation Administration may—
>
> (A) acquire, establish, improve, operate and maintain air navigation facilities; and
>
> (B) provide facilities and personnel to regulate and protect air traffic.

STATEMENT OF THE CASE

This matter concerns whether the Federal Aviation Administration (FAA) can lawfully install a Terminal Doppler Weather Radar (TDWR) within the confines of Gateway National Recreation Area (Gateway) in contravention of the intent of Congress.

In 1972, Floyd Bennett Field and surrounding areas in Brooklyn, Queens and northern New Jersey were designated as national parkland pursuant to the Gateway Act. Gateway Act of 1972, Pub. L. 92-592 §2, codified at 16

U.S.C. § 460cc. Along with the Golden Gate National Recreation Area, Gateway National Recreation Area was designated as one of two "urban parks" in the country. On March 29, 1999, the Federal Aviation Administration issued a Record of Decision (ROD) ordering the installation of a TDWR system at the United States Coast Guard Air Station, Brooklyn, also known as Floyd Bennett Field, within Gateway.

Gateway was created to give residents of the New York and New Jersey metropolitan region access to national park space in a densely populated area where open space and pastoral refuge is generally lacking. In fact, the Park's primary purpose was and remains to bring the benefits of the national parks closer to urban residents. In its entirety, Gateway contains ocean beaches, dunes, woodlands, bays, a wildlife refuge, as well as two historic airfields and the nation's oldest operating lighthouse. The park serves as a major source of outdoor space for activities such as swimming, boating, fishing, bird watching and horseback riding.

Each year, upwards of four million people visit Gateway. Of this number, 750,000 visit Floyd Bennett Field alone. In addition, 50,000 students attend educational programs at Floyd Bennett Field every year. Other groups who use and enjoy Gateway regularly include members of the petitioner organizations: The Friends of Gateway, Educators for Gateway, and The Floyd Bennett Gardens Association.

The Jamaica Bay unit of Gateway encompasses approximately 4,450 acres of land and marshland in and near Jamaica Bay. The unit is divided into three subdivisions: Floyd Bennett Field, North Shore, and Jamaica Bay Wildlife Refuge. Floyd Bennett Field was New York City's first

municipal airport. It was later converted into the United States Coast Guard (USCG) Air Station - Brooklyn. Today, Floyd Bennett Field encompasses about 1,448 acres and is divided between public and governmental uses.

The public areas of Floyd Bennett Field include Hangar Row, the North 40 Nature Trail and miles of former runways used for cycling or in-line skating. Festivals, outdoor concerts and other special events are held at the site during the summer and fall seasons. The governmental area of Floyd Bennett Field includes the USCG Air Station. In 1997, the Department of Transportation (DOT)—as the parent agency of both the Coast Guard and the FAA—reassigned from the Coast Guard to the FAA 1.8 acres in the middle of the Coast Guard Air Station. In 1998, the DOT transferred administration of the remainder of the property under its control (not including the 1.8 acre parcel) to the Department of Interior (DOI). The site of the Radar Tower is on the 1.8 acres of FAA property.

TDWR is an automated weather surveillance system designed to provide warnings to approaching and departing aircraft of potentially dangerous weather conditions, such as wind shear. Following a series of air crashes that were blamed on wind shear or other serious weather conditions, Congress authorized the FAA to develop a system to detect these conditions. TDWR was the result of that project.

The Gateway TDWR, which is constructed but not operational, is comprised of an 82-foot tall steel lattice tower supporting a 33-foot tall, 37-foot diameter spherical dome enclosing a 25-foot diameter parabolic dish antenna. The facility also includes a 26-foot by 46-foot building to house the backup generator and computer equipment, as well as above ground diesel fuel tanks with the capacity of about 1,300 gallons to power the backup generator. *See Friends of*

Gateway v. Slater, No. 99-4081, at 6 (2d Cir., filed July 9, 2001) (available at the Appendix). This 117-foot tower and antenna occupies a 1.81 acre section of what is now open park space surrounded by homes.[1] There are no other structures of its height in the vicinity and the TDWR dominates the vista. Its presence in the area does not conform to the other buildings and structures in and around Gateway.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals in this case is erroneous in light of the plain meaning of the Gateway Act and involves the important federal question of whether the FAA can act in clear contravention of the will of the Congress as expressed in statute.

The Gateway Act plainly states that the recreation area shall include Floyd Bennett Field within the Jamaica Bay unit. The Act further provides that there can be no expansion of "air facilities" within the Gateway recreation area. The FAA's order approving the installation of a TDWR at Floyd Bennett Field within the parklands of Gateway violates the express language of the Gateway Act,

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[1] Ironically, in addition to the impacts on Gateway and the surrounding communities, the site itself fails to best accomplish the TDWR's safety objective. When the FAA first began to look for possible venues for TDWR facilities, the Site Selection Committee was seeking one site to cover LaGuardia Airport and another for Kennedy Airport. The Site Selection Committee did not even examine Gateway as a possible venue for the LaGuardia facility because the site did not meet the criteria required for the TDWR to achieve its safety purpose. Gateway was examined as a possible venue for the Kennedy facility and expressly rejected because it did not best achieve the safety purpose of the TDWR.

16 U.S.C. § 460cc-2(e) (1976), and therefore is not in accordance with the law.

As this Court held in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), statutes must be construed in accordance with the plain meaning of their terms and the intent of Congress. Congress made clear its intent when it created Gateway in 1972. It established the first urban national park in the country, with the goal of providing many city dwellers, particularly the less affluent, their "only real hope...to visit a unit of the national park system." H.R. Rep. No. 92-1392, at 4884 (1972). The park was specifically intended to provide recreational and aesthetic experiences for New Yorkers without the resources to visit the Grand Canyon, Yellowstone or other distant national parks.

A. The Gateway recreation area created by statute includes the lands the FAA intends to use for the TDWR

The Act defines the purposes and perimeters of the Gateway "recreation area" as follows:

> In order to preserve and protect for the use and enjoyment of present and future generations an area possessing outstanding natural and recreational features, the Gateway National Recreation Area (hereinafter referred to as the "recreation area") is hereby established.
>
> **(a) Composition and boundaries**
>
> The recreation area shall comprise the following lands, waters, marshes, and submerged lands in the

New York Harbor area generally depicted on the map entitled "boundary Map, Gateway National Recreation Area," numbered 951-40017 sheets 1 through 3 and dated May, 1972:

(1) Jamaica Bay Unit – including all islands, marshes, hassocks, submerged lands, and waters in Jamaica Bay, Floyd Bennett Field, the lands generally located between highway route 27A and Jamaica Bay and the area of Jamaica Bay up to the shoreline of John F. Kennedy International Airport.

16 U.S.C. § 460cc.

The Gateway Act on its face clearly states that the term "recreation area" includes all land and water listed, and not just those transferred to the administrative jurisdiction of the Secretary of the Interior, as the Court of Appeals provided. Had Congress intended to limit Section 460cc-2(e) to apply only to those lands transferred to the Secretary of Interior it would have done so explicitly. Instead, the Gateway Act expressly includes Floyd Bennett Field within the "recreation area" and hence within Gateway itself.

The Second Circuit Court of Appeals rejects petitioners' claim on the basis that the term "recreation area" in the statute includes only lands that have been transferred to the administrative jurisdiction of the Secretary of the Interior, and that this provision did not apply to Floyd Bennett Field, which has not been so transferred. However, as Judge Cardamone states in his dissent, this reading of the term "recreation area" clearly contradicts the plain language of the Gateway Act.

The majority errs in attempting to circumvent the plain meaning of the statute. The majority notes that the Gateway Act broadly carves out a number of "enclaves" within which other federal agencies may retain whatever administrative jurisdiction they previously enjoyed until such time as they voluntarily cede control to the Secretary of Interior. *See* 16 U.S.C. § 460cc-1(b). However, the mere fact that a statute establishes a general scheme does not preclude Congress from creating specific exceptions to that scheme, especially where the language used is clear and unambiguous. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) (invoking "the canon that specific provisions qualify general ones") (*citing Simpson v. United States*, 435 U.S. 6, 15 (1978)). In fact, the plain language of Section 460cc-2(e) creates precisely such an exception by permitting the Secretary of Transportation to retain only joint jurisdiction with respect to air facilities, presumably to give the Secretary of the Interior veto power over the installation of air facilities that might detract from the natural beauty of Gateway. *See* 16 U.S.C. § 460cc-2(e).

B. The statute plainly prohibits the construction of air facilities within the statutorily defined Gateway recreation area; the TDWR is such a prohibited air facility.

The Gateway Act makes clear that there can be no lawful expansion of air facilities at the site. Section 460cc-2(e) states:

> The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and

> which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, that nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

Since the term "air facilities" is not defined, the Court must give it its ordinary meaning. As the Supreme Court held in *Chevron*, "[t]he ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose." *See Chevron*, 467 U.S. at 860. Air facilities are numerous and varied in nature, but they all contain those "integrated elements" used to assist in the operation of an airport and air travel generally. Air facilities include hangers, lights used to direct aircraft to the runway, or radar towers used to detect inclement weather. TDWR, which consists of several integrated elements, including a tower and a building, is used to detect poor weather conditions such as "wind shear" and "microbursts" for the exclusive purpose of assisting air operations. *See Friends of Gateway v. Slater*, No. 99-4081, at 5 (2d Cir., filed July 9, 2001). Upon detection, air traffic controllers notify pilots, who in turn avoid the severe weather in their flight path. TDWR is an "air facility" because its sole purpose is to facilitate the arrival and departure of aircraft at Kennedy and LaGuardia Airports during inclement weather.

The FAA, an agency whose sole purpose is overseeing aviation, has implicitly acknowledged that TDWR is an air facility by the very fact it has undertaken the responsibility for its siting and installation. On the first page of its ROD, the agency relies upon two statutory provisions for its authority to issue an order with regard to TDWR

siting: The proposed action of installing a single TDWR to serve Kennedy and LaGuardia Airports is consistent with the responsibilities of the FAA Administrator under 49 U.S.C. Sections 44501 and 44502 *et seq.*" § 44501(a) provides in part:

> The Administrator of the Federal Aviation Administration shall make long range plans and policy for the orderly development and use of the navigable airspace and the orderly development and location of air navigation facilities.

Section 44502(a)(1) provides:

> The Administrator of the Federal Aviation Administration may acquire, establish, improve, operate and maintain air navigation facilities; and provide facilities and personnel to regulate and protect air traffic.

The agency cannot have its cake and eat it too. If TDWR is an "air navigational facility" for the purposes of FAA planning, establishment, and maintenance, it must also be an "air facility" for purposes of the statutory prohibition against expansion at Floyd Bennett Field. This provision of the Act and the clear intent of the Congress plainly prohibit installation of the TDWR at Floyd Bennett Field.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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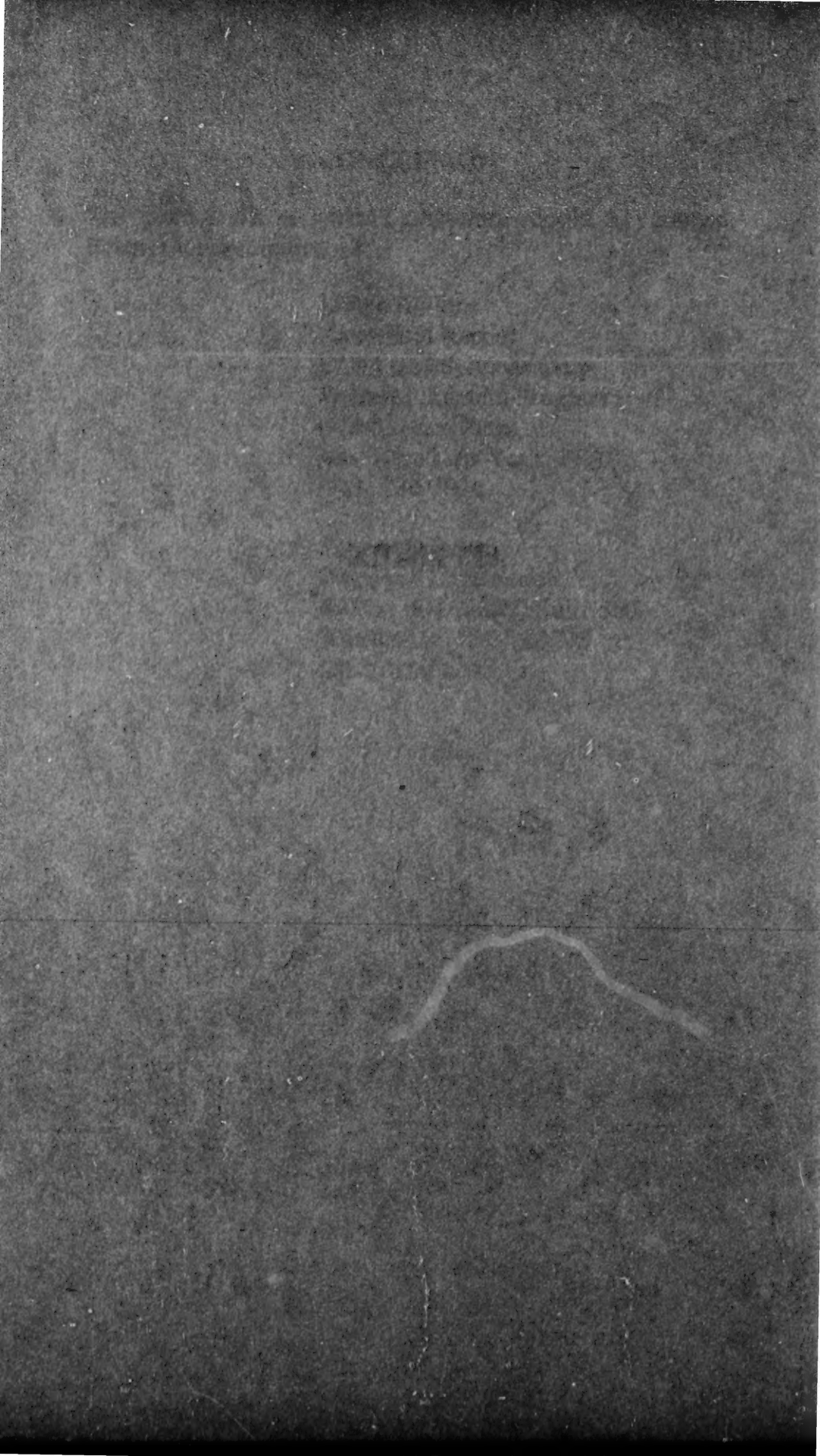

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

Docket No. 99-4081

FRIENDS OF GATEWAY, FLOYD BENNETT FIELD GARDENS ASSOCIATION, BARREN ISLAND MARINA BOATERS ASSOCIATION, PENNSYLVANIA AVENUE RADIO CONTROL SOCIETY OF GATEWAY NATIONAL PARK, and EDUCATORS OF GATEWAY,

Petitioners,

v.

RODNEY SLATER, Secretary of Transportation, JANE F. GARVEY, Administrator, Federal Aviation Administration, UNITED STATES DEPARTMENT OF TRANSPORTATION, and FEDERAL AVIATION ADMINISTRATION,

Respondents.

Argued: March 9, 2000
Decided: July 09, 2001

BEFORE: CARDAMONE, MCLAUGHLIN, PARKER, Circuit Judges.

Petition for review of the March 29, 1999 decision of the Federal Aviation Administration ("FAA"), approving installation of a radar tower on FAA- administered land within the boundaries of Gateway National Recreation Area.

PETITION DENIED. Judge Cardamone dissents in a separate opinion.

John Minardo, BLS LEGAL SERVICES CORP., Federal Litigation Program, Brooklyn, NY, for Petitioners.

Jeff C. Dobbins, United States Department of Justice, Washington, DC, for Respondents.

PARKER, Circuit Judge:

Friends of Gateway, Floyd Bennett Field Gardens Association, Barren Island Marina Boaters Association, Pennsylvania Avenue Radio Control Society of Gateway National Park, and Educators of Gateway petition for review of the March 29, 1999 order (the "Order") of the Federal Aviation Administration (the "FAA"), authorizing the installation of a Terminal Doppler Weather Radar System (the "Radar Tower" or "TDWR") on FAA-administered land at Floyd Bennett Field ("Floyd Bennett Field" or the"Field"), within the boundaries of Gateway National Recreation Area ("Gateway"). Petitioners argue that § 460cc-2(e) of the Gateway National Recreational Area Act of 1972, Pub. L. No. 92-592 (October 27, 1972), codified at 16 U.S.C. §§ 460cc to 460cc-4 (the "Gateway Act"), prohibits the installation of the Radar Tower on any property at Floyd Bennett Field within the boundaries of Gateway. The FAA

argues, inter alia, that its use of its own land within the boundaries of Gateway is not restricted by § 460cc-2(e). For the following reasons, we affirm the decision of the FAA to site the Radar Tower on its property at Floyd Bennett Field.

I. BACKGROUND

A. Floyd Bennett Field and Gateway National Recreation Area

Floyd Bennett Field was built in 1930 as New York City's first municipal airport. In 1936, New York City leased approximately ten acres of property on the eastern part of the Field to the United States Coast Guard (the "Coast Guard Air Station"). In May 1941, New York City leased the remainder of the Field to the United States Navy. In November 1941, President Roosevelt transferred the Coast Guard to the Department of the Navy. During World War II, the entire Field was ceded to the United States Navy for the purpose of creating the Naval Air Station, Floyd Bennett Field. Thus, by 1943, the entire Field was under the jurisdiction of the Department of the Navy.

On January 1, 1946, the Coast Guard was transferred to the Department of the Treasury and on April 1, 1967, the Coast Guard was transferred to the newly formed Department of Transportation ("DOT"). In 1971, the Naval Air station was decommissioned, but the Coast Guard Air Station remained in operation under the jurisdiction of the DOT.

In 1972, Congress established Gateway as one of two "urban parks," the other being Golden Gate National Recreation Area ("Golden Gate") in San Francisco. See Gateway Act; Golden Gate National Recreation Area Act of 1972, Pub. L. 92- 589 (October 27, 1972), codified at 16 U.S.C. §§ 460bb to 460bb-5 (the "Golden Gate Act"). Floyd Bennett Field was included within the boundaries of the

Jamaica Bay Unit of Gateway. See 16 U.S.C. § 460cc(a)(1). Upon enactment of the Gateway Act, the Department of the Interior ("DOI") took over administration of the Field, except the portion administered by the Coast Guard as the Coast Guard Air Station and another section administered by the Armed Forces Reserve. The Gateway Act permitted the agency with control over these non-DOI federal enclaves to continue using the property until such time, if ever, as that agency decided to transfer administration of the property to the DOI. See 16 U.S.C. § 460cc-1(b); Natural Resources Defense Council, Inc. v. Marsh, 836 F.2d 87, 88 (2d Cir. 1987) (interpreting Gateway Act); Gateway General Management Plan.

In 1997, the DOT, as the parent agency of both the Coast Guard and the FAA, reassigned, from the Coast Guard to the FAA, 1.8 acres in the middle of the Coast Guard Air Station (the "FAA Property"). Petitioners do not challenge this interdepartmental transfer. In 1998, the DOT transferred administration of the remainder of the property under its control (not including the 1.8 acre parcel) to the DOI; the DOI then leased the property to the New York City Police Department for use as a home base for its helicopters for the next 25 years. The proposed site for the Radar Tower is on the 1.8 acres of FAA Property.

B. Choosing the Site for the Radar Tower

In 1975, Eastern Airlines Flight 66 crashed at John F. Kennedy International Airport ("JFK"), killing 112 people. One of the causes of the accident was a type of low-altitude wind shear called a "microburst," which is a small but powerful downward rush of cold air that spreads out as it reaches the ground. A microburst can cause the wind direction to shift 180 degrees several times within the space of a few miles. An aircraft passing through a microburst is in extreme danger. The aircraft will encounter a strong

headwind, causing the pilot to compensate by changing altitude or throttling back. As the plane passes through the center, the wind turns into a tail wind, decreasing lift and resulting in loss of altitude and control. Occasionally, this results in an aircraft being pushed into the ground. By 1983, microbursts and other wind shear had resulted in 28 airline accidents. In 1985, 137 people died near the Dallas-Fort Worth airport when an American Airlines aircraft crashed as a result of an undetected microburst.

After the risks associated with these weather patterns became clear, the FAA began developing a detection system in conjunction with public and private researchers. Microbursts are very difficult to detect using conventional radar systems. The Terminal Doppler Weather Radar System ("TDWR") combines standard radar with the Doppler effect[1] to effectively detect wind shear and developing microbursts. TDWR warns air traffic controllers of these conditions several minutes before an aircraft enters the area. It is comprised of a steel-lattice tower, 87 feet high by 17 feet square, topped by a white "radome" that shields the antenna from weather and birds. It also includes a small building at the base of the tower to house computer systems used to gather and evaluate distance and speed information and transmit it to air traffic controllers.

These radar systems have been installed near airports all over the country and Congress has been clamoring for the FAA to install one for JFK and LaGuardia Airport ("LaGuardia"). See S. Rep. 104-126, at 53 (1995) ("The Committee is extremely concerned that the FAA has made no progress on siting . . . the TDWR . . . ."). Initially,

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[1] "Doppler effect" refers to changes in wavelength and frequency of a wave as a result of the motion of the source of the waves. These changes in waves are analyzed to measure the velocity and distance of remote objects. See Webster's Third New International Dictionary 675 (1981).

Congress funded two Radar Towers to serve JFK and LaGuardia, one for each airport. See J.A. Volume II (Final Environmental Impact Statement ("EIS"))[2] at 6. In 1993, the FAA completed environmental assessments and reached preliminary conclusions regarding preferred locations. Congress and the local community opposed the FAA's choices because both were very close to residential neighborhoods. As a result, the FAA began reconsidering its conclusions. During that time, Congress decided that one Radar Tower could serve both JFK and LaGuardia, see id., and it earmarked the funds for the surplus system to be installed at McCarran International Airport in Las Vegas, Nevada. As a result, the FAA was required to locate a new site that would provide the proper coverage for JFK and LaGuardia airports. See id.

In 1995, the FAA began the technical evaluation and environmental impact review of sites for the single Radar Tower. The result of the FAA's work was a 1999 Final Environmental Impact Statement, the EIS. The EIS reviews several possible locations and alternatives to installation of the Radar Tower. The EIS concludes that the best alternative is installation of the Radar Tower at Floyd Bennett Field. According to the EIS, installing the Radar Tower at Floyd Bennett Field provides the best possible coverage for both airports, presents none of the maintenance concerns of an island or offshore facility, and has no significant environmental impact. The proposed site is already closed to the public; the nearest residences are one and one half miles away; the public gardens are more than a mile away; and there is a 200 foot National Park Service ("NPS") radio tower one quarter of a mile away. Furthermore, the site is already being used as an air facility, and the site is on land

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[2] Instructions on how to obtain a copy of the EIS appear at 64 Fed. Reg. 16516 (1999).

already being administered by the FAA.

After the required notice and comment period under the Administrative Procedures Act, on March 30, 1999, the FAA issued the Order and the record of decision, which concluded that the Radar Tower should be placed on the FAA Property at Floyd Bennett Field. See 64 Fed. Reg. 16516 (1999)(announcing issuance of record of decision and EIS, and announcing that "by order of the Administrator a single TDWR will be installed at U.S. Coast Guard Air Station Brooklyn site"). Petitioners filed a timely petition for review in this Court.

II. DISCUSSION

A. Jurisdiction

This Court has jurisdiction to review a decision of the FAA pursuant to 49 U.S.C. § 46110(a), which provides in relevant part that

> a person disclosing a substantial interest in an order issued by . . . the Administrator of the Federal Aviation Administration . . . may apply for review of the order by filing a petition for review in the . . . court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.

49 U.S.C. § 46110(a). Once the petition is before the Court, the Court

> has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the . . . Administrator to conduct

> further proceedings. After reasonable notice to the . . . Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary or Administrator, if supported by substantial evidence, are conclusive.

Id. § 46110(c).

The Supreme Court has stated, however, that Congress cannot create Article III standing by statute. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992). Furthermore, the Supreme Court recently decided that this Court must address any jurisdictional standing question first, before deciding a case on the merits. See Steel Co. v. Citizens for a Better Env't, 523 U.S.83, 93-94 (1999) ("The Ninth Circuit [and the Second Circuit have] denominated this practice--which [they] characterize[] as `assuming' jurisdiction for the purpose of deciding the merits--the `doctrine of hypothetical jurisdiction.' We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.") (citations omitted) (footnote omitted). Although respondents do not challenge petitioners' Article III standing, we must nevertheless take it upon ourselves to determine whether we have jurisdiction over this case.

The petitioners in this case allege that they frequently and regularly use areas of Gateway that would be affected by expansion of airway facilities within the park, and that they have an interest in having their use preserved. In addition, petitioners contend that their recreational use would be affected by the eyesore that is this Radar Tower. Thus, petitioners have presented sufficient allegations to support their standing to petition for review of the FAA Order. See

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687-90 (1973); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

B. Section 460cc-2(e) does not restrict the FAA's use of the FAA Property

Petitioners argue that the FAA Order violates 16 U.S.C. § 460cc-2(e), which provides:

> The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, That nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

16 U.S.C. § 460cc-2(e). Focusing on the last sentence in this section (the "Proviso"), petitioners claim that the plain meaning of the statute compels the conclusion that installing the Radar Tower is an "expansion" of "air facilities" at Floyd Bennett Field.[3]

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[3] Petitioners argue in the alternative (for the first time in their Reply Brief) that, even if installation of the Radar Tower at Floyd Bennett Field is not an expansion of air facilities prohibited by the Proviso, § 460cc-2(e) otherwise requires the DOT to come to an

The FAA argues that: (1) the plain meaning of § 460cc-2(e) does not support a reading that prohibits installation of the Radar Tower at Floyd Bennett Field; (2) the legislative history of the Gateway Act reinforces the FAA's interpretation of § 460cc-2(e) as prohibiting only physical encroachment by airports into park lands; (3) the Gateway Act as a whole and its legislative history support a reading that the use-restriction of § 460cc-2(e) does not apply to FAA-administered property; and (4) the FAA-administered property is not within the recreation area and therefore the Gateway Act does not apply at all. Because we agree with the FAA that the use-restriction of § 460cc-2(e) does not apply to the FAA Property, we do not address the FAA's other arguments.

As petitioners contend, we review the FAA's interpretation of the statutory language de novo. Petitioners cite only one case in their brief, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Chevron stands for the proposition that a court must construe a statute in accordance with its plain meaning and the intent of Congress, see id. at 859-62, and also for the proposition that a Court owes deference to an agency's interpretation of a statute only if it is an enabling statute for that agency, see id. at 844-45 ("`If this choice represents a reasonable accommodation of conflicting policies that were

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agreement with the DOI when exercising the authority "to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area." Petitioners argue that the FAA violated the statute by failing to establish a plan that was mutually acceptable to the DOT and the DOI before providing for notice and comment and reaching a decision on its proposed site.

First, petitioners waived this alternative argument by not raising it prior to filing their Reply Brief, and by inadequately raising it there. Second, the argument is irrelevant because we hold that § 460cc-2(e) does not apply to the FAA's use of the FAA Property at Floyd Bennett Field.

committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'") (emphasis added) (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)). The Gateway Act is not an enabling statute for the FAA. Thus, as petitioners argue, the FAA's "choice" to site the Radar Tower at Floyd Bennett Field cannot be a "reasonable accommodation of conflicting policies" committed to the FAA by the Gateway Act, and we interpret the statute without deference to the FAA's interpretation.

Looking at the overall structure and the legislative history of the Gateway Act, we conclude that Congress did not intend to restrict the use of federal land that is located within the boundaries of Gateway pursuant to § 460cc(a) but not yet acquired by the DOI pursuant to § 460cc-1. The Gateway Act consists of five sections, only three of which are relevant to this case: (1) "Establishment," 16 U.S.C. § 460cc; (2) "Acquisition of property," id. § 460cc-1; and (3) "Administration," id. § 460cc-2. Section 460cc establishes the "[c]omposition and boundaries" of Gateway, including within its boundaries the Jamaica Bay Unit, which in turn includes "Floyd Bennett Field." Id. § 460cc(a)(1). Section 460cc-1 authorizes the DOI to acquire in various ways the lands and waters "within the boundaries of the recreation area." Id. § 460cc-1(a) & (b). In § 460cc-1(a), Congress authorized the DOI to acquire lands and waters "[w]ithin the boundaries of the recreation area," or interests therein, from individuals and the states of New York and New Jersey. Id. § 460cc-1(a). In § 460cc-1(b), Congress authorized the transfer, at the discretion of the federal agency having custody, of "any Federal property within the boundaries of the recreation area . . . to the administrative jurisdiction of the [DOI] for administration as part of the recreation area."

Id. § 460cc-1(b). Section 460cc-2[4] directs the DOI to administer the recreation area "in accordance with" the other sections of the Gateway Act. Id. § 460cc- 2(a).

These sections read together indicate that lands and waters within the boundaries of the recreation area pursuant to § 460cc, but not yet acquired by the DOI pursuant to § 460cc-1(a) or (b), are not part of the recreation area, and are not subject to "administration" pursuant to § 460cc-2. More specifically, § 460cc-1(b) indicates that the non-DOI federal enclaves within the boundaries of the recreation area are not part of the recreation area, and are not subject to "administration" pursuant to § 460cc-2. Once we determine that property administered by federal agencies other than the DOI is neither "part" of Gateway nor subject to administration pursuant to § 460cc-2, it follows that § 460cc-2 does not apply to those agencies' use of that property.[5]

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[4] The other two sections are entitled "Gateway National Recreation Area Advisory Commission," id. § 460cc-3, and "Authorization of appropriations; limitation; adjustments," id. § 460cc-4.

[5] The dissent contends that our reading of this provision renders the provision "nonsensical." This provision, however, explicitly distinguishes between those lands "within the boundaries of the recreation area" but controlled by another federal agency and those lands that are "part of the recreation area" and within the "administrative jurisdiction of the [DOI]." 16 U.S.C. § 460cc-1(b) (emphasis added.) The dissent equates these two terms, by asserting that the DOT and the DOI have joint jurisdiction over the 1.8 acres of FAA property within the boundaries of the recreation area although this property has not been transferred to the DOI, and thus concludes that § 460cc-2(e) applies to this property. Such a reading renders the distinction that Congress outlined in § 460cc-1(b) without meaning, because it grants to the DOI jurisdiction over lands not yet transferred to it. We therefore conclude that Congress' explicit distinction in § 460cc-1(b) indicates its intent that lands not yet transferred pursuant to that section are not part of the administrative jurisdiction of the DOI.

That Congress intended to leave enclaves within the boundaries of Gateway that would not be subject to the use-restrictions covering the land administered as part of the recreation area is supported by the concurrent enactment of the Golden Gate Act. See Marsh, 836 F.2d at 90 (relying heavily on the differences between the Gateway Act and the Golden Gate Act in interpreting § 460cc-1(b) of the Gateway Act). The original bills for both the Gateway and Golden Gate Acts required that federal lands be transferred to the DOI upon enactment, and required that the DOI allow existing uses by other federal agencies for as long as "reasonably required to fulfill the mission assigned to [the lands]." H.R. Rep. No. 92-1392 (1972), reprinted in 1972 U.S.C.C.A.N. 4882, 4889 (the "Gateway House Report"); see H.R. Rep. No. 92-1391, reprinted in 1972 U.S.C.C.A.N. 4850, 4857 (discussing proposed Golden Gate legislation). Only the Golden Gate Act, however, ultimately provided for such automatic transfer of most federal lands within the boundaries of Golden Gate, see 16 U.S.C. § 460bb-2 (section on "Acquisition"), and for the DOI's administration of these lands "acquired for the recreation area." Id. § 460bb-3(a) (section on "Administration"). The Golden Gate Act required the DOI to allow the continuation of existing uses of land formerly held by other agencies. See id. § 460bb-2(a). In contrast, the Gateway Act provided that federal agencies holding federal lands within the boundaries of Gateway may transfer those lands, and that only at that point would those lands be administered by the DOI as part of Gateway. See id. § 460cc-1(b).

Furthermore, whereas the Golden Gate Act clearly restricted the use of lands "under the administrative jurisdiction of a department other than [the DOI]," id. § 460bb-2(i) ("New construction and development within the boundaries described in § 460bb-1(a) of this title on lands under the administrative jurisdiction of a department other than [the DOI] is prohibited, except that improvements on

lands which have not been transferred to [the DOI's] administrative jurisdiction may be reconstructed or demolished."), the Gateway Act never similarly restricted the use of lands under the administrative jurisdiction of a federal agency other than the DOI. If Congress had wanted to restrict the use of federal lands held by other agencies within the boundaries of Gateway, Congress could have provided for such restrictions as it did in the Golden Gate Act. As the Golden Gate Act demonstrates, Congress knew how to implement such restrictions if it so desired. Instead, Congress chose in the Gateway Act to leave the use of non-transferred federal lands within the boundaries of Gateway to the discretion of the holding agency.

We also find it persuasive that in the one place where the Golden Gate Act uses the identical restrictive terminology used in § 460cc-2(e) of the Gateway Act, the restrictions on activities "within the recreation area" clearly refer only to lands already transferred to the DOI for administration as part of the park. See id. § 460bb-2(g). Section 460bb-2(g) provides:

> When this property is determined to be in excess to the needs of the Coast Guard, it shall be transferred to the jurisdiction of the [DOI] for purposes of this subchapter [i.e., Administration]. The Coast Guard may continue to maintain and operate existing navigational aids: Provided, That access to such navigational aids and the installation of necessary new navigational aids within the recreation area shall be undertaken in accordance with plans which are mutually acceptable to the [DOI] and the [DOT] and which are consistent with both the purposes of this subchapter and the purpose of existing statutes dealing with establishment,

> maintenance, and operation of navigational aids.

Id. § 460bb-2(g). In this section, "within the recreation area" refers to lands "transferred to the jurisdiction of the [DOI] for purposes of [administering Golden Gate]." Id. Congress presumably meant the same when it used the identical language in the Gateway Act to restrict the DOT's authority to maintain, operate, and install air facilities "within the recreation area." Id. § 460cc-2(d) & (e). Although the restrictions in the Gateway Act are not preceded by language mandating the transfer of certain land to the DOI, that is because the Gateway Act does not mandate the transfer of any land to the DOI. See Marsh, 836 F.2d at 90. [6]

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[6] The dissent correctly points out that § 460bb-2(g) "grants joint jurisdiction over the installation of new navigational aids 'within the recreation area.'" Dissent at 7. In concluding that § 460cc-2(e), in language similar to § 460bb-2(g), also grants joint jurisdiction to both the DOT and the DOI over the 1.8 acres of FAA property within the boundaries of Floyd Bennett Field, the dissent fails to recognize that § 460bb-2(g)'s grant of joint jurisdiction refers specifically to lands that have already been transferred (as is mandated by the Golden Gate Act) to the administrative jurisdiction of the DOI, and are thus "within the recreation area." Therefore, like § 460bb-2(g)'s grant of joint jurisdiction, § 460cc-2(e)'s grant of joint jurisdiction refers to lands that have been transferred to the administrative jurisdiction of the DOI and thus are "within the recreation area."

The dissent relies, in part, on § 460cc-2(e)'s lack of explicit "temporal language" as contained in the Golden Gate Act's § 460bb-2(g). Dissent at 9. As we earlier stated, however, § 460bb-2(g) contains explicit temporal language because the Golden Gate Act, unlike the Gateway Act, mandated transfer of lands to the DOI immediately upon enactment of the Golden Gate Act. See 16 U.S.C. § 460bb-2(a). Section 460bb-2(g) is an exception to this policy, providing that the Coast Guard may retain jurisdiction over certain lands, but must transfer the property "when the property is determined to be excess to the needs of the Coast Guard." Therefore, language similar to § 460bb-2(g)'s provision that "[t]he Coast Guard may continue to maintain and operate existing

The legislative history of the Gateway Act, and particularly § 460cc-2(d) [7] and (e), also supports our interpretation of the statute. In officially responding to several proposed bills for establishing Gateway, the Department of the Army made clear that much of the existing military lands were still needed for military purposes or would be transferred to the Coast Guard for the DOT's purposes, and that the Gateway Act should not interfere with that use. See Gateway House Report, 1972 U.S.C.C.A.N. at 4901- 02, 4905. The Department of the Army also suggested that the Gateway Act include a section providing for mutual agreement between the DOI and the Army Corps of Engineers with regard to water resource development. See id. at 4905. Similarly, the DOI suggested that the legislation provide for mutual agreement between the DOI and the DOT with regard to maintaining and expanding JFK. See id. at 4901. The House's response, section 3 of the proposed bill, is described in the Gateway House Report as dealing "with the administrative authority of the [DOI]. . . . [I]t permits the [DOI] to establish working arrangements with the Secretaries of the Army and Transportation with respect to functions which are compatible with the purposes of this legislation."

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navigational aids" is unnecessary in § 460cc-2(e) because § 460cc-2(e) does not contain any reference to the transfer of lands.

[7] Section 460cc-2(d), entitled "Water resource developments," provides:

> The authority of the Secretary of the Army to undertake or contribute to water resource developments, including shore erosion control, beach protection, and navigation improvements . . . on land and/or waters within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of the Army and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with water and related land resource development.

See id. at 4892 (emphasis added). This reference to "permitting" the DOI to "establish working arrangements" became § 460cc-2(d) and (e). This legislative history indicates that these sections were meant to provide for the Army's and the DOT's agreement with the DOI before acting within their otherwise available authority, i.e., pursuant to "existing statutes," 16 U.S.C. § 460cc- 2(d) & (e), in such a way that would affect land administered by the DOI. These sections were not intended to interfere with the Army's military use of the land it retained or the DOT's use of the land the Army transferred to it.

Several official DOI acts and DOI documents also support this reading of §§ 460cc-1(b) and 460cc-2(e). In 1994, for example, the DOI, through the NPS, officially revised the boundaries of Gateway "because Fort Wadsworth is being transferred to the [NPS] as a result of the closure of Naval Station New York." 59 Fed. Reg. 43588 (1994). Although Fort Wadsworth was already entirely "within the boundaries" of the Recreation Area pursuant to § 460cc(a)(4), the DOI nevertheless found that certain portions of Fort Wadsworth were "not suitable for inclusion in Gateway National Recreation Area," id. at 43588 (emphasis added), and did not include them in the park. This finding of the DOI implies that before transfer, the property was not yet part of Gateway. In addition, the NPS's 1979 Gateway General Management Plan stated that certain non-DOI federal "enclaves," including the Coast Guard Property at Floyd Bennett Field, are "excluded properties." The NPS's 1983 Development Concept Plan for Floyd Bennett Field depicts the Coast Guard property and other non-DOI federal enclaves as separate from the recreation area lands at Floyd Bennett Field.

Finally, this Court has characterized § 460cc-1(b) as creating non-DOI federal enclaves not included within the recreation area. See Marsh, 836 F.2d at 88 (discussing the transfer of property from the Army to the DOI "for inclusion

in the recreation area"). Marsh held that the Army could transfer property under its jurisdiction to the Navy rather than the DOI: "Although the Gateway Act includes Fort Wadsworth within the boundaries of the Gateway National Recreation Area, the Act specifies no time for the Fort's transfer to the [DOI] and imposes no limitations on the Department of Defense's intervening use." Id. at 90 (emphasis added). The Court reached this conclusion notwithstanding § 460cc-2(d)'s requirement that the Department of the Army consult and agree with the DOI in its water resources development activities "within the recreation area." 16 U.S.C. § 460cc-2(d). Consistent with Marsh, we conclude that the Gateway Act likewise imposes no limitations on the DOT's intervening use of its own property, even though § 460cc-2(e) requires the DOT to consult and agree with the DOI in its air facility development activities "within the recreation area." Id. § 460cc-2(e).

III. CONCLUSION

For the foregoing reasons, we hold that § 460cc-2(e) does not apply to the FAA's use of its own property and therefore does not prohibit the FAA from exercising its otherwise existing authority to install the Radar Tower on the FAA Property at Floyd Bennett Field. Neither does § 460cc-2(e) require the FAA to reach agreement with the DOI in order to exercise that authority. We therefore affirm the FAA Order.

We note that the FAA has filed a motion for reconsideration of its motion requesting that we take judicial notice of the now existing agreement between the DOT and the DOI concerning installation of the Radar Tower. Because we conclude that § 460cc-2(e) is inapplicable, the agreement between the DOI and DOT was unnecessary to the FAA's decision. The existence of the agreement is therefore irrelevant to our determination. The FAA's motion for reconsideration is denied.

CARDAMONE, Circuit Judge, Dissenting:

In their challenge to the March 29, 1999 order of the FAA authorizing the installation of a Radar Tower at Floyd Bennett Field that lies wholly within the Gateway National Recreation Area (Gateway), petitioners argue that installation of the Radar Tower is prohibited by § 460cc-2(e) of the Gateway National Recreation Area Act of 1972, Pub. L. No. 92-592, 86 Stat. 1308 (codified as amended at 16 U.S.C. §§ 460cc to 460cc-4) (Gateway Act). Because I agree with petitioners, I respectfully dissent from the majority's contrary conclusion.

I Applicability of Section 460cc-2(e)

Petitioners' challenge relies entirely on § 460cc-2(e) of the Gateway Act, which states

> The authority of the Secretary of Transportation to maintain and operate existing airway facilities and to install necessary new facilities within the recreation area shall be exercised in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purpose of this subchapter and the purpose of existing statutes dealing with the establishment, maintenance, and operation of airway facilities: Provided, That nothing in this section shall authorize the expansion of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field.

16 U.S.C. § 460cc-2(e) (1994) (first emphasis added).

The majority rejects petitioners' contention on the grounds that the term "recreation area" in the statute includes only lands that have been transferred to the administrative jurisdiction of the Secretary of the Interior, and that this provision simply does not apply to Floyd Bennett Field, which has not been so transferred. To the contrary, however, this reading of the term "recreation area" contradicts the plain language of the Gateway Act.

In particular, the opening section of the Gateway Act defines the term "recreation area" in relevant part as follows:

> In order to preserve and protect for the use and enjoyment of present and future generations an area possessing outstanding natural and recreational features, the Gateway National Recreation Area (hereinafter referred to as the "recreation area") is hereby established.
>
> (a) Composition and boundaries
>
> The recreation area shall comprise the following lands, waters, marshes, and submerged lands in the New York Harbor area generally depicted on the map entitled "Boundary Map, Gateway National Recreation Area," numbered 951-40017 sheets 1 through 3 and dated May, 1972:
>
> (1) Jamaica Bay Unit -- including all islands, marshes, hassocks, submerged lands, and waters in Jamaica Bay, Floyd Bennett Field, the lands generally located between highway route 27A and

> Jamaica Bay, and the area of
> Jamaica Bay up to the
> shoreline of John F. Kennedy
> International Airport;
>
> . . . .

Id. § 460cc (emphases added).

Thus, the Gateway Act plainly provides that the term "recreation area" shall include all of the enumerated lands and waters, and not just those transferred to the administrative jurisdiction of the Secretary of the Interior, Indeed, the very section of the Gateway Act that allows for discretionary transfers of agency jurisdiction, upon which the majority heavily relies in its reasoning, reinforces this distinction when it states that "[w]ith the concurrence of the agency having custody thereof, any Federal property within the boundaries of the recreation area may be transferred . . . to the administrative jurisdiction of the Secretary for administration as a part of the recreation area." Id. § 460cc-1(b) (emphasis added). Under the majority's narrow equation of the term "recreation area" with those lands already under the Secretary's control, this provision becomes nonsensical. [1]

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[1] In response, the majority proposes a creative but counter-intuitive distinction between the "recreation area" and the "boundaries of the recreation area" as those phrases are used in § 460cc-1(b). The majority asserts that the "recreation area" includes only those lands over which the Secretary exercises jurisdiction, but that the "boundaries of the recreation area" include all lands listed in § 460cc, regardless of jurisdiction. See Majority, supra, at 14 n.5. But if this distinction was intended, one would expect the Gateway Act to use those terms consistently. Instead, § 460cc-1(b) recognizes that the Secretary has jurisdiction only over "part[s] of the recreation area" (emphasis added) and not necessarily the entire "recreation area." More importantly, the statute's definitional section uses these terms interchangeably. Section 460cc(a), entitled "Composition and boundaries," states that "[t]he recreation area shall comprise the following lands" depicted on the

Thus, I cannot join my respected colleagues' assertion that Floyd Bennett Field is not "part" of Gateway, see Majority, supra, at 14. Instead, the Gateway Act expressly includes Floyd Bennett Field within the "recreation area" and hence within Gateway itself. "Since there is a presumption that a given term is used to mean the same thing throughout a statute," Brown v. Gardner, 513 U.S. 115, 118 (1994) (citing Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)), we are bound to read the term "recreation area" as used in § 460cc-2(e) to include Floyd Bennett Field. Had Congress' purpose been to limit § 460cc-2(e) to apply only to lands ceded to the administrative jurisdiction of the Secretary of the Interior, it could easily have done so explicitly, rather than writing the section to apply more generally to all lands within the "recreation area" as that term is broadly defined in § 460cc(a).

The majority attempts to circumvent this plain language by pointing to the fact that the Gateway Act broadly carves out a number of "enclaves" within which other federal agencies may retain whatever administrative jurisdiction they previously enjoyed until such time as they voluntary cede control to the Secretary of the Interior. See 16 U.S.C. § 460cc-1(b). The mere fact that a statute establishes a general scheme does not preclude Congress from creating specific exceptions to that scheme, especially where the language used is unambiguous. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) (invoking "the canon that specific provisions qualify general ones") (citing

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"Boundary Map," "including . . . Floyd Bennett Field." Section 460cc(b), entitled "Boundary revisions," allows for "minor revisions of the boundaries of the recreation area when necessary by publication of a revised [map] or other boundary description." Because § 460cc(a) and § 460cc(b) use these terms interchangeably, and explicitly include Floyd Bennett Field within the "recreation area," the majority's distinction I believe is untenable.

Simpson v. United States, 435 U.S. 6, 15 (1978)). The plain language of § 460cc-2(e) creates precisely such an exception by permitting the Secretary of Transportation to retain only joint jurisdiction with respect to air facilities, presumably to give the Secretary of the Interior veto power over the installation of air facilities that might detract from the natural beauty of Gateway.

This reading of § 460cc-2(e) is underscored by comparison with the Golden Gate National Recreation Area Act, Pub. L. No. 92-589, 86 Stat. 1299 (codified at 16 U.S.C. §§ 460bb to 460bb-5) (Golden Gate Act). Unlike the Gateway Act, the Golden Gate Act generally requires the immediate transfer of all federal lands within the Golden Gate National Recreation Area to the administrative jurisdiction of the Secretary of the Interior. See 16 U.S.C. § 460bb-2(a) (1994). Nonetheless, the Golden Gate Act also provides by way of exceptions that certain lands will remain within the charge of Departments other than the Department of the Interior. See, e.g., id. § 460bb-2(c) (retaining jurisdiction under the Department of the Army); id. § 460bb-2(f) (retaining jurisdiction under the Department of Defense); id. § 460bb-2(h) (retaining jurisdiction under the Department of the Navy). Only when the lands in question are determined to be in excess of the assigned Department's needs will they be transferred to the administrative jurisdiction of the Secretary of the Interior in accordance with the Golden Gate Act.

In particular, the Golden Gate Act carves an exception for certain properties to remain under the jurisdiction of the Department in which the Coast Guard operates. See id. § 460bb-2(g). This provision is particularly relevant to our analysis of the Gateway Act because it explicitly qualifies that should the Coast Guard transfer control to the Secretary of the Interior, then the two Departments would exercise joint jurisdiction:

> Point Bonita, Point Diablo, Point Montara, and Lime Point shall remain under the jurisdiction of the Secretary of the Department in which the Coast Guard is operating. When this property is determined to be excess to the needs of the Coast Guard, it shall be transferred to the jurisdiction of the Secretary [of the Interior] for purposes of this subchapter. The Coast Guard may continue to maintain and operate existing navigational aids: Provided, That access to such navigational aids and the installation of necessary new navigational aids within the recreation area shall be undertaken in accordance with plans which are mutually acceptable to the Secretary [of the Interior] and the Secretary of the Department in which the Coast Guard is operating and which are consistent with both the purposes of this subchapter and the purpose of existing statutes dealing with establishment, maintenance, and operation of navigational aids.

Id. (second emphasis added).

Here, a number of points merit note. First, as evidenced throughout § 460bb-2, Congress is fully capable of creating explicit exceptions to a general scheme for apportioning administrative jurisdiction among federal agencies. Had Congress intended to carve out an exception for Floyd Bennett Field from the "recreation area" governed by the Gateway Act, as the majority contends, it could have done so. Moreover, to the extent § 460bb-2(g) creates an exception for joint jurisdiction, reading § 460cc-2(e) of the Gateway Act to create a similar exception -- albeit in mirror

image to the Golden Gate Act -- therefore produces no anomalies.

Second, much like § 460cc-2(e) of the Gateway Act, § 460bb-2(g) of the Golden Gate Act grants joint jurisdiction over the installation of new navigational aids "within the recreation area," which is once again defined by the opening sections of the statute to encompass all enumerated lands. See id. §§ 460bb, 460bb-1(a). Contrary to the majority's reasoning, see Majority, supra, at 16, § 460bb-2(g) therefore requires joint approval of new navigational aids throughout the "recreation area" as that term is broadly defined by the statute. Accordingly, it may be inferred that Congress' use of similarly broad language in the Gateway Act was not the result of oversight, and that such language should be strictly followed by reading the term "recreation area" as used in § 460cc-2(e) to encompass Floyd Bennett Field. [2]

Third, to the extent § 460bb-2(g) of the Golden Gate Act imposes conditions whose timing hinges on the transfer of administrative jurisdiction, § 460bb- 2(g) does so explicitly. It provides that the Coast Guard "may continue to maintain and operate existing navigational aids" (emphasis added), following the transfer of jurisdiction from the Coast Guard to the Secretary of the Interior. If § 460cc-2(e) of the

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[2] In response, the majority continues to rely on the mistaken premise that the "recreation area" includes only those lands transferred to the jurisdiction of the Secretary of the Interior, rather than all of those lands listed in the statutes as "compris[ing]" the "recreation area." See Majority, supra, at 17-18 n.6. In the Golden Gate Act, these alternate definitions tend to merge, since § 460bb-2(a) provides for the automatic transfer of all listed lands to the Secretary. In the Gateway Act these definitions produce different results, since § 460cc-1(b) provides for voluntary transfers. The key point is that both statutes define the "recreation area" broadly to comprise all of the listed lands, and both statutes' provisions for joint jurisdiction adhere to this broad definition of "recreation area."

Gateway Act were designed to apply only following such a transfer, Congress presumably would have used similarly explicit temporal language to achieve that result. [3]

Our decision in Natural Resources Defense Council, Inc. v. Marsh, 836 F.2d 87 (2d Cir. 1987), does not reach a contrary conclusion. The majority cites Marsh for the proposition that the Gateway Act "imposes no limitations on the Department of Defense's intervening use" of Gateway lands prior to the transfer of jurisdiction of those lands to the Secretary of the Interior, see id. at 90, notwithstanding language in § 460cc-2(d) granting joint jurisdiction to the Secretaries of the Army and the Interior in a manner analogous to § 460cc-2(e).

Marsh, however, presented the limited question of whether the language in § 460cc-1(b), which permits the transfer of control to the Secretary of the Interior, prohibited the Secretary of the Army from transferring control of certain Gateway lands to another federal department not mentioned in § 460cc- 1(b), namely, the Navy. See id. at 88. Because § 460cc-2(d) addresses only "water resource developments" by the Army, and not transfers of administrative jurisdiction, that provision was simply irrelevant to the Marsh decision (which neither discussed nor even cited § 460cc-2(d)). Accordingly, the statement in Marsh about "intervening use" of Gateway lands was not a holding with respect to actions other than transfers of jurisdiction between federal departments as governed by § 460cc-1(b).

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[3] In response, the majority contends that no temporal language is necessary in § 460cc-2(e) because that section contains no reference to the transfer of lands. See Majority, supra, at 18 n.6. But it is precisely because the section speaks in unqualified terms and contains no reference to the transfer permitted by § 460cc-1(b) that I would read it to apply at all times, regardless of whether a transfer has taken place. The majority's contrary view that § 460cc-2(e) applies only post-transfer hinges entirely on its cramped reading of the term "recreation area," which I reject for the reasons discussed above.

In sum, § 460cc-2(e) of the Gateway Act imposes a blanket restriction on the authority of the Secretary of Transportation without reference to any transfer of jurisdiction to the Secretary of the Interior. Because the language of the statute is unambiguous, recourse to the legislative history is unnecessary. See Desiderio v. National Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 204 (2d Cir. 1999) (citing Ex Parte Collett, 337 U.S. 55, 61 (1949)).

Even were such recourse appropriate, the legislative history is equivocal as to the temporal effect of § 460cc-2(e), since, as discussed below, the history suggests that one purpose of the provision was to put an immediate stop to then-pending proposals to use Floyd Bennett Field as a general aviation field in service to other airports. Because the legislative history is conflicted on this point, the majority's reliance on isolated statements is misplaced. See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

II Merits of Petitioners' Claim

Consequently, I would conclude that 16 U.S.C. § 460cc-2(e) applies to the installation of the Radar Tower at Floyd Bennett Field and would therefore reach the merits of petitioners' claim that such installation is prohibited by the section's proviso against "the expansion of . . . air facilities at Floyd Bennett Field." Because the majority does not reach this claim, I address only a few key points.

First, the term "air facilities," used in the proviso of § 460cc-2(e), appears nowhere else in the U.S. Code. Yet, a federal statute does define the similar term "air navigation facility" to mean "a facility used . . . in aid of air navigation, including . . . apparatus or equipment for distributing weather information." 49 U.S.C. § 40102(a)(4) (1994). Although the two terms are not identical, they are sufficiently similar that I would read "air facilities" to encompass the arguably

narrower category of "air navigation facilities" and thus to embrace the proposed Radar Tower at Floyd Bennett Field.

The government contests this interpretation, contending that the term "air facilities" "generally refers not to a particular aviation-related structure, but to the entire collection of buildings, runways, and other support devices at an airfield." As a result, the government maintains, the proviso in 16 U.S.C. § 460cc-2(e) bars only the expansion of the military airfields already in existence at Floyd Bennett Field and thus poses no obstacle to the installation of a single weather tower or other isolated structure unrelated to those existing airfields.

Even assuming arguendo that the government's strained reading of the term "air facilities" is reasonable, its argument still founders. To begin with, the proposed Radar Tower is plainly an expansion of the collection of devices that support John F. Kennedy International (JFK) and LaGuardia Airports. Although the government would presumably retort that these airports exist elsewhere and therefore are not "at" Floyd Bennett Field, this is a distinction without a difference.

Specifically, the legislative history of the Gateway Act reveals that Congress considered alternative proposals to develop Floyd Bennett Field as either a recreational area within Gateway, a housing community, or a general aviation field. See, e.g., Gateway Area Proposals: Hearings on H.R. 1370, H.R. 1121, and Related Bills Before the Subcomm. on Nat'l Parks and Rec. of the House Comm. on Interior and Insular Affairs, 92d Cong. 287 (1971) (statement of Rep. Roy A. Taylor, Chairman, Comm. on National Parks and Recreation). Under the third proposal, new installations at Floyd Bennett Field would have been undertaken to divert general aviation traffic from JFK and LaGuardia Airports and hence reduce air traffic congestion at those airports as part of an "integrated airport plan" for the New York City metropolitan area. Id. at 73, 221, 224 (statement of Rep.

Frank J.Brasco, for the district including Floyd Bennett Field); see id. at 234-47 (statement of John V. Lindsay, Mayor of New York City).

But by including Floyd Bennett Field within the recreation area, Congress opted instead for the recreational proposal and accordingly enacted the current proviso barring "the expansion of . . . air facilities at Floyd Bennett Field." As a consequence, the modifying phrase "at Floyd Bennett Field" must be read as referring not to the location of the airfield serviced by a particular expansion -- since that would permit the very result the statute was designed to avoid -- but instead to the location of the new installations. Logically, therefore, the proviso plainly prohibits installation of the Radar Tower at Floyd Bennett Field.

Finally, the government asserts it would be absurd to read the proviso as prohibiting installation of the Radar Tower at Floyd Bennett Field, but not at any other location within Gateway, since Floyd Bennett Field is already more developed than other portions of Gateway, both for aviation purposes and otherwise. As discussed above, however, Congress enacted the proviso in the face of a specific proposal to expand air facilities at Floyd Bennett Field, and it was entirely logical to tailor the proviso to that particular proposal.

Moreover, the legislative history is replete with references to the recreational potential of Floyd Bennett Field. See, e.g., Gateway Nat'l Recreation Area: Hearings on S. 1193 and S. 1852 Before the Subcomm. on Parks and Rec. of the Senate Comm. on Interior and Insular Affairs, 92d Cong. 44, 47- 48 (1971) (statement of Mr. Hartzog, Director, National Park Service); S. Rep. No. 92-345, at 4-5 (1971); H.R. Rep. No. 92-1392 (1972), reprinted in 1972 U.S.C.C.A.N. 4882, 4885; 118 Cong. Rec. 32,133, 32,136, 32,137-38, 32,152 (1972). Hence, it was far from absurd for Congress to seek to preserve those positive attributes by generally limiting development at the Field.

CONCLUSION

For the reasons set forth above, I would grant the petition for review of the FAA's March 29, 1999 order authorizing the installation of the Radar Tower at Floyd Bennett Field. Accordingly, I concur with my colleagues in denying the FAA's motion for reconsideration, since the agreement between the Departments of the Interior and of Transportation would not affect my conclusion that the proviso in § 460cc-2(e) bars the installation of the Radar Tower at Floyd Bennett Field.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 01 759

IN THE

Supreme Court of the United States

FRIENDS OF GATEWAY, EDUCATORS OF GATEWAY, FLOYD BENNETT FIELD GARDENS ASSOCIATION,

Petitioners,

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, JANE GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL APPENDIX

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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

RECORD OF DECISION
FOR TERMINAL DOPPLER WEATHER RADAR TO SERVE JOHN F. KENNEDY INTERNATIONAL AND LAGUARDIA AIRPORTS, NEW YORK CITY, NEW YORK

Section 1. Decision

Pursuant to the authority granted to the Administrator of the Federal Aviation Administration (FAA) found at 49 United States Code (U.S.C.) Subtitle VII, Part A, and a careful review of the administrative record, including the final environmental impact statement (EIS) released in January 1999, it is the final determination of the FAA that installation and operation of the Terminal Doppler Weather Radar (TDWR) to serve John F. Kennedy International (JFK) and LaGuardia (LGA) Airports at the U.S. Coast Guard (USCG) Air Station Brooklyn site in Kings County, New York, is approved. This action was identified as both the agency's preferred alternative and the environmentally preferable alternative in the final EIS.

The proposed action of installing a single TDWR to serve JFK and LGA Airports is consistent with the responsibilities of the FAA Administrator under 49 U.S.C. §§44501 and 44502 *et seq.* This action is also consistent with direction provided by Congress in the 1995 Department of Transportation and Related Agencies Appropriations Act, P.L. 103-331 (Sept. 30, 1994), Conference Report on H.R-4556, 103rd Congress, 2nd Session, 140 *Congressional Record* 9-603 (Sept. 26, 1994). In reaching this decision,

careful consideration has been given to aviation safety and operational needs as well as potential environmental effects.

A discussion of the factors considered by the FAA in reaching this decision follows.

Section 2. Purpose and Need

The purpose of the proposed action is to detect and track severe weather in the vicinity of JFK and LGA Airports. That information is used to warn pilots of potentially hazardous weather conditions, thereby enhancing aviation safety, and to plan airport runway use configurations, thereby enhancing the efficiency of airport operations. However, the proposed action will not result in changes at either airport in airport capacity, number of flights, airport approach and departure procedures or standard flight paths of aircraft arriving or departing those airports.

The FAA, as part of the U.S. Department of Transportation (DOT), routinely develops and deploys advanced weather surveillance systems to serve the nation's airports. The Administrator of the FAA is authorized and directed by Title 49 U.S.C. §44502 to prescribe, among other aviation-related activities, the locations of air safety systems such as TDWR. TDWR is an automated radar system designed to provide accurate and reliable detection and tracking of severe weather conditions that are hazardous to aircraft, thereby enhancing aviation safety. TDWR is a highly sophisticated Doppler weather radar and represents a significant improvement over alternative methods of detecting and tracking severe weather features. It is specifically designed to detect and track Microbursts, a type of wind shear that presents a grave risk to aircraft in flight and has been the primary cause for a number of aircraft accidents and hundreds of fatalities. A tragic example of this hazard is

Eastern Airlines flight number 66; that plane crashed due to wind shear on approach to JFK Airport in 1975, resulting in 112 deaths. Hazardous weather has been identified as a cause of 18 accidents involving commercial aircraft since 1970, resulting in 575 fatalities. A Doppler weather radar system located at the U.S. Coast Guard Air Station Brooklyn site will enable the FAA to improve the safety of air travel at JFK and LGA Airports through the timely detection, tracking, and reporting of severe weather.

The U.S. Congress has appropriated funds for 47 TDWR units to serve high-priority airports. Prior to Fiscal Year 1995, the FAA proposed the installation of two TDWR units to serve JFK and LGA Airports in New York City----one *TDVWR* at the Roslyn Air National Guard Station in Nassau County, New York, to serve LGA airport and a second TDWR at the Bellmore U.S. Army Reserve Center in Nassau County, New York, to serve JFK airport. However, after Congress directed the FAA, in the House/Senate Conference Report accompanying the 1995 DOT Appropriations Act, to install a single TDWR to serve both JFK and LGA Airports, the FAA conducted an in-depth site survey of a single TDWR to serve the two airports. TDWR survey found that a single TDWR, located at the U.S Coast Guard Air Station Brooklyn site, could most effectively track, detect, and report severe weather that may affect aircraft using JFK and LGA Airports.

Of the 47 TDWR units for which funds were authorized by Congress, 39 have been commissioned and are in full operation serving high priority airports in the U.S., two units are being used for technical support and training at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, four are installed and in pre-commissioning check-out and the remaining two units are planned for installation in the near future, one to serve JFK and LGA Airports and the

other to serve Chicago Midway Airport. The production line for TDWR units has long been closed and the manufacture of additional TDWR units is not practical or economically feasible. Thus, in keeping with congressional direction and the, availability of a single TDWR unit, the FAA has determined that a single TDWR will be issued to serve JFK and LGA Airports at the former U.S. Coast Guard Air Station Brooklyn. Installation of a single TDWR at this site will most effectively provide the radar coverage required to reduce severe weather hazards to aircraft approaching and departing JFK and LGA Airports.

Section 3. Proposed Action

TDWR is an automated radar operating at a frequency of 5,600 to 5,650 megahertz. This TDWR system will consist of a 25-foot parabolic dish enclosed in a 37-foot diameter fiberglass radome, mounted on a steel-lattice tower with a height of 82 feet. The total height of the structure will be 117 feet. Electronic equipment and a standby generator to provide emergency electric power will be enclosed in a one-story, roughly 1,200-square- foot building at the base of the tower. These items will be located within a 110-foot by 110-foot fenced area. TDWR is automated and no staff will normally be present at the site; periodic maintenance visits will occur about once per week. The proposed location for TDWR is a 1. 8 1 -acre FAA-owned parcel at the former U.S. Coast Guard Air Station Brooklyn at Floyd Bennett Field in the Borough of Brooklyn (Kings County), New York City. The former U.S. Coast Guard property has been used for aviation and transportation purposes for over six decades and is part of Floyd Bennett Field, a former municipal airport and U.S. Navy base. In 1972, the Gateway Act (16U.S.C.§460cc-1 et. seq.] established Gateway National Recreation Area (NRA). Included within the boundaries of the recreation area were a number of

properties owned by a number of federal agencies, including the Departments of Defense and Transportation (e.g., U.S. Coast Guard Air Station Brooklyn), and properties owned by local government and private parties.

After establishment of Gateway NRA, the U.S. Coast Guard Air Station Brooklyn continued as a base for helicopter operations in Support of search and rescue missions until its closure by the U.S. Coast Guard in 1998. After closure of the air station the property, with the exception of the 1.81-acre FAA parcel was, transferred to the National Park Service. The National Park Service, in turn, leased the property for a period of 25 years to the New York City Police Department for operations of the Aviation Unit and the property is currently used for helicopter landings and takeoffs and maintenance and repair of police helicopters. The FAA parcel planned for installation of TDWR is wholly surrounded by the property leased to the New York City Police Department and is roughly 400 feet south of the helicopter operations area actively used by the Police. The FAA property is only accessible by crossing the police property and access to the police property is restricted to authorized persons only, because of the hazard from helicopter operations as well as the need for security.

The FAA property and the surrounding New York City Police Department leasehold property generally are within the recreation area as defined by the Gateway Act which established Gateway NRA. However, there are no recreational resources located at the FAA property. The general public is not allowed onto either the police or FAA properties and no public recreational activities occur on either of these properties. The entire former U.S. Coast Guard property, including both the police and FAA properties, is expressly designated as a nonpark use area by the Gateway *General Management Plan,* prepared by the

National Park Service. Even in the absence of TDWR, the access restrictions necessary for police helicopter operations would prevent use of the FAA property by the general public for recreational purposes. Installation of TDWR would not remove any property from existing or possible future recreational or other use by the public, at least for the twenty-five years during which the adjacent property is leased to the New York City Police Department for the purpose of conducting helicopter operations.

The installation of TDWR at the former U.S. Coast Guard Station Brooklyn is consistent with the purpose and intent of the Gateway Act. Moreover, the Gateway Act does not prohibit the installation of the TDWR at the FAA property at Floyd Bennett Field. Section 3(e) of the Gateway Act [16 U.S.C. §460cc-2(e)] specifically recognizes the "authority of the Secretary of Transportation to install necessary new facilities within the recreation area ... in accordance with plans which are mutually acceptable to the Secretary of the Interior and the Secretary of Transportation and which are consistent with both the purposes of this subchapter and the purpose of existing statutes dealing with the establishment maintenance, and operation of airway facilities...." While the TDWR is equipment to be installed on an existing airway facility, and not a "new facility" within the apparent intended meaning of the Gateway Act its use of the existing facility is consistent with the National Park Service's Gateway *General Management Plan* designation of this area for "nonpark use." The lease by the National Park Service of the property surrounding the FAA property to the New York City Police Department demonstrates that this plan for this area to be for nonpark use is intended to continue for at least the next 25 years. This plan of the Secretary of the Interior has been and remains acceptable to the Secretary of Transportation.

Section 3(e) also states that it does not authorize the "expansion" of airport runways into Jamaica Bay or air facilities at Floyd Bennett Field. Expansion of "airport runways" and associated "air facilities" (e.g. taxiways, hangars etc.) is very different than "installation" of equipment such as the TDWR. Nowhere in the statute is there a prohibition of "installation" of equipment at Floyd Bennett Field. Nor is there any mention of such a prohibition in the Conference Report on the Gateway Act. The only reference found in the Conference Report is to "airway facilities" where paragraph 12 of the Joint Statement of the Committee reads: "The committee accepted the House provision prohibiting further extension of the runways into Jamaica Bay." [Legislative History, P.L. 92-592, Conference Report No. 92-1589, 92nd Congress, Second Session 1972)] Reading this statement together with Section 3(e), it is clear that what Congress intended to preclude that section was expansion of runways and similar facilities, not installation of needed equipment such as TDWR.

Careful consideration of the past and present uses of the site and vicinity and detailed environmental analyses contained in the final EIS show that installation and operation of TDWR at this site will not result in significant adverse effects on natural and cultural resources of the area, including the recreation values of Gateway NRA Installation of TDWR at this site is in accordance with the Gateway *General Management Plan,* published by the National Park Service, which designates the entire former U.S. Coast Guard Station Brooklyn, including the 1.8 acres owned by the FAA, as a nonpark use area.

Construction of TDWR is expected to occur during 1999 and will last approximately 4 months. Tower and electronics delivery through flight check and commissioning will last an additional 6 months. All construction waste will be removed

from the site and properly disposed off-site, in permitted waste disposal facilities. TDWR is expected to be in service for approximately 20 years, the typical life span for this type of equipment.

Section 4. Alternatives Considered

The Final EIS evaluates potential environmental effects of the proposed action and seven alternative actions, described below:

TDWR at the selected site (agency's preferred alternative) at former U.S. Coast Guard Air Station Brooklyn. TDWR at this site would provide low-level radar coverage of the essential microburst warning area for both JFK and LGA Airports. It would also be easier to access and maintain than TDWR at the alternative locations considered in the Final EIS and, as a result, would be in service a greater proportion of the time.

TDWR at a site on Hart Island in the Borough of the Bronx, New York City. TDWR located at Hart Island would require installation of a roughly 3,000-foot underwater cable between City Island and Hart Island to provide telephone and electric service. TDWR at Hart Island would provide slightly better radar coverage of LaGuardia Airport but much worse coverage of JFK Airport.

TDWR at a typical ocean site. This alternative was suggested by members of the public during the EIS scoping period. The TDWR would require extensive design modifications for ocean use and conditions, including but not limited to personnel safety facilities, exterior fighting and a foghorn to reduce

the risk of a boat collision with TDWR, and installation of a runway 2-mile underwater cable in Lower New York Bay to provide electric power and telephone service for TDWR.

TDWR adjacent to the U.S. Coast Guard Ambrose Light in Lower New York Bay. This alternative was suggested by members of the public during the EIS scoping period. A new ocean platform would have to be constructed because the U.S. Coast Guard platform could not physically accommodate TDWR. The design modification described above for TDWR at the ocean site and a roughly 6- mile underwater cable in Lower New York Bay would be necessary to provide electric power and telephone service for TDWR.

Electronic wind shear systems on aircraft. These systems are only available for certain types of larger, generally commercial, aircraft and provide far less warning time than TDWR. Many aircraft could not be equipped with these systems and would not be protected.

Airport surveillance radar/weather system processor (ASR/WSP). An electronics upgrade package, known as a weather system processor (WSP), would add severe weather detection, tracking, and reporting capabilities to the existing airport surveillance radar- (ASR) at IFK Airport. ASR/WSP could not be installed at LGA Airport because there is no ASR at that airport and no plans to install one. Due to the limited range of ASR/WSP, an ASRIWSP at JFK Airport could not serve LGA Airport.

FAA use of the existing Doppler 4000. This alternative was suggested by members of the public during the Draft EIS comment period. Doppler 4000 is a weather radar owned and operated by a private television station in Manhattan. Doppler 4000 is not designed to detect wind shear and microbursts, two of the most hazardous weather conditions to aircraft and is poorly located to provide low-level radar coverage of JFK and LGA Airports.

No-action alternative. This alternative would not fulfill the need to provide timely warning to pilots and air traffic controllers of severe weather conditions.

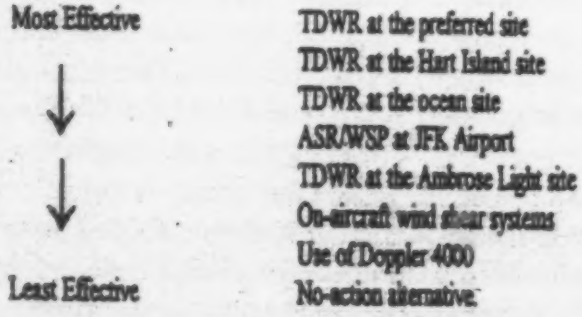
The Conference Report accompanying the DOT and Related Agencies Appropriations Act for Fiscal Year 1995 expressly addresses the need for wind-shear protection for New York City airports. (Conference Report on H.R. 4556, 103rd Congress 2nd Session (1994)). In the Conference Report the conferees also expressed that they 'firmly" supported the proposition that TDWR "... will not be sited in North Bellmore or Roslyn' and directed the FAA to site a single TDWR to serve both LaGuardia and IFK Airports.

Installation of a single TDWR at the Bellmore site or the Roslyn site would not provide coverage for both airports. Therefore, in accordance with congressional direction, neither installation of two TDWR at sites in Roslyn and Bellmore, nor the installation of a single TDWR at either site were further examined in this final EIS as alternative actions. In addition, as the Report language evidences congressional disapproval and strongly suggests intent not to fund TDWRs at these sites, these sites were remote, speculative, and no longer reasonable alternatives capable of implementation. In light of the close of production and the fact that there is now

only one TDWR available for installation to serve both JFK and LGA Airports, these sites are also unreasonable to meet the purpose and need of the proposed action. Given the lack of potentially significant adverse impacts of the preferred alternative, the National Environmental Policy Act's goals and policies would not be served by retaining these sites for detailed study and seeking to modify Congressional approval or funding.

Congressional direction aside, given the close of production and the fact that only one TDWR is now available to serve both JFK and LGA airports, the installation of two TDWRs at two separate sites for each JFK and LGA Airports is no longer a reasonable alternative.

The effectiveness of each alternative analyzed in the final EIS at fulfilling the required mission is based on the volume of airspace for which radar coverage is provided, the location of radar coverage with respect to airspace at and near the two airports of concern, and the types and numbers of aircraft served. In terms of mission effectiveness, the proposed action and alternatives are ranked from most effective to least effective as follows:


Most Effective
Least Effective
TDWR at the preferred site
TDWR at the Hart Island site
TDWR at the ocean site
ASR/WSP at JFK Airport
TDWR at the Ambrose Light site
On-aircraft wind shear systems
Use of Doppler 4000
No-action alternative

On-aircraft wind shear systems, ASR/WSP, or use of Doppler 4000 would not fulfill the mission; therefore these alternatives were not analyzed in the Affected Environment and Environmental Consequences and Mitigation sections of the Final EIS. The no-action alternative would also not fulfill the mission, but is extensively analyzed in the Final EIS for comparative purposes as required by Council on Environmental Quality Regulations at *40 Code of* ***Federal Regulations*** **(CFR) 1502.14** and chapter 6, **paragraph** 64 of **FAA** Order 1050. ID.

Section 5. Mission Effectiveness of Alternatives

The mission of TDWR is to detect and track severe weather events that may be hazardous to aircraft during flight landings, or take-offs, or that may affect airport operations. TDWR fulfills that mission by providing radar coverage of the microburst alert warning area (MAWA) which surrounds the runways at the airports of interest and the principal coverage region (PCR), which is the area within 6 nautical miles (nmi) of the approximate center of the airport. The extent to which TDWR can provide radar coverage of the MAWA and PCR depends on the location of TDWR with respect to the airports to be served. The degree to which an alternative technology such as ASR/WSP can provide radar coverage is also dependent on the location of its host radar with respect to the airports of interest. On-aircraft systems are mounted on a mobile platform (the airplane), thus the location with respect to the airport is not of concern as is the case for stationary radar systems. Table I summarizes the mission effectiveness of the alternatives (except the no-action alternatives, compared to the proposed action of installing TDWR at U.S. Coast Guard Air Station Brooklyn site, agency's preferred alternative. The analysis presented in Table 1 accounts for all factors affecting mission

effectiveness, including distance to the airport angle to the runway most used during inclement weather, cone of silence, radar blockage by hills and buildings, portion and types of aircraft served, earth curvature, and difficulty of operation and maintenance.

As shown in Table 1, the proportion of time which a TDWR at Hart Island could operate would be less than for TDWR at the preferred site because of the relatively inaccessibility of Hart Island, which is served by a ferry operating only 14 percent of the time. TDWR at Hart Island would have suitable angles to the runways at JFK Airport most used during inclement weather, but would have a radar floor at considerably greater height above the airport than that of TDWR at the preferred site. Radar coverage of JFK Airport would be considerably poorer from TDWR at Hart Island than from TDWR at the preferred site because of the distance from JFK Airport which is greater than optimal and blocking of the radar beam by hills and buildings. TDWR at Hart Island would be closer to LGA Airport than TDWR at the preferred site and would have an acceptable angle to the runway used most during inclement weather. However, blockage of the TDWR beam would be caused by the towers of the Throgs Neck and Whitestone Bridges as well as vehicles on those bridges, and could adversely affect the effectiveness of radar coverage. Overall the deficiency in radar coverage of the JFK Airport and access difficulties would render TDWR at Hart Island less effective than TDWR at the preferred site.

On-aircraft wind shear systems are much more limited in their capabilities than TDWR, They do not provide comprehensive radar coverage of the airport area, as TDWR would, but would provide limited radar coverage for use by the individual pilots flying equipped planes. The information from these systems is not widely distributed to air traffic

controllers, who relay the information widely to Airport users, as is the case for TDWR data. On-aircraft wind shear systems also have reduced range and detection capabilities compared with TDWR. Because of the relatively small percentage of airplanes that are or can be equipped with such Systems and the lesser technical capability, ties alternative would not be able to effectively fulfill TDWR's mission.

ASR/WSP is designed to provide similar inflation as TDWR. However, like TDWR, its effectiveness is dependent upon location with respect to the airports to be served. The ASR-9 host at JFK Airport is located on the airport near the runways most used during inclement weather.

Since ASR cannot scan at high elevation angles and is located at the airport, WSP's effectiveness would be reduced substantially. Portions of the MAWA and PCR for JFK Airport would be included in the cone of silence for ASR/WSP and would not receive radar coverage. The portions of the MAWA and PCR for JFK Airport not receiving radar coverage would be far greater than for TDMM installed at the preferred site. The angles to the runways at JFK Airport most used during inclement weather are somewhat better for this alternative than for the TDWR at the preferred site. Overall, this alternative would be substantially less effective at serving JFK Airport than TDWR at the preferred site. Due to intervening obstructions, radar coverage of LGA Airport would be considerably poorer for ASR/WSP than the TDWR at the preferred site. In addition, the angle to the runway most used during inclement weather would be much larger for ASR/WSP than for TDWR at the preferred site. Both factors would cause ASR/WSP to provide considerably reduced radar coverage of LGA Airport compared with the TDWR at the preferred site. To summarize, this alternative would provide less

effective radar coverage of both JFK and LGA Airports than the TDWR at the preferred site.

TDWR at an ocean site would also offer less effective coverage than TDWR at the preferred site. TDWR at an ocean site would be similar to the TDWR at the preferred site in terms of both radar coverage of JFK Airport and angles to runways at JFK Airport. TDWR at an ocean site would be the optimal distance from JFK Airport (8-12 nmi) while TDWR at the preferred site would be less than optimal distance from JFK Airport. However, this would be offset by physical blocking of the TDWR signal by the buildings on Rockaway Island, which would reduce the effective coverage of JFK Airport by TDWR at an ocean site. Radar coverage of JFK Airport by TDWR at the preferred site would, not be affected by those buildings. With regard to LGA Airport, the floor of radar coverage would be higher above airport level than for the TDWR at the preferred site. There would be little difference between this and the TDWR at the preferred site in angles to the runway most used during inclement weather. TDWR on an ocean platform would be available for operation for a far lower percentage of the time that TDWR at the preferred site, because of the relative difficulty of accessing an ocean platform. Thus, the TDWR at the preferred site would be considerably superior at serving LGA Airport than this alternative.

Table 1
MISSION EFFECTIVENESS OF ALTERNATIVES
COMPARED WITH TDWR AT THE PREFERRED SITE

	TDWR at Hart Island	On-aircraft Wind shear systems	ASR/WSP at JFK	TDWR At Ocean Site	TDWR at Ambrose Light Site	Doppler 4000 Radar
Radar Coverage of MAWA/PCR						
JFK	--	N/A	-	0	-	-
LGA	+		--	-	--	-
Angle to Inclement Weather Runway						
JFK	0	N/A	+	0	0	--
LGA	+		--	0	-	-
Advance Warning of Weather Events	yes	some systems only	yes	yes	yes	yes
Airplanes Served	all	Equipped commercial jets only	all	all	all	all
Service Availability	--	--	0	--	--	0

\+ Marginally superior to preferred action
\- Marginally inferior to preferred action
-- Considerably inferior to preferred action
0 Similar to preferred action
N/A Not applicable

TDWR located at the Ambrose Light site would be an appropriate distance from JFK Airport but much further from LGA Airport than is acceptable. In regard to geometry to the runways most used during inclement weather, the angle to JFK Airport would be acceptable, but the angle to LGA Airport would be far larger- than is desired. In general radar coverage of JFK Airport would be fairly good but radar coverage of LGA Airport would be much poorer than for TDWR at the preferred or other alternative sites contained in this Final EIS. The amount of time in service would be reduced by the difficulty of repairing TDWR and its infrastructure in an ocean setting.

Although Doppler 4000 can provide information of general weather conditions, it cannot identify wind shear or microbursts. Its location, at large angles to the runways used during inclement weather, and height above the ground will

adversely affect its capabilities Thus, Doppler 4000 cannot fulfill TDWR's mission.

With regard to overall mission effectiveness, TDWR at the preferred site and alternatives can be ranked as follows (from most effective to least effective): TDWR at the U.S. Coast Guard Air Station Brooklyn site, TDWR at Hart Island site, TDWR at ocean site, ASRIWSP, TDWR at Ambrose Light site, on-aircraft wind shear systems, Doppler 4000 and the no-action alternative. ASR/WSP and on-aircraft wind shear systems alternatives would be deficient in filtering the desired mission. ASR/WSP would not detect wind shear or microbursts at LGA Airport. On-aircraft systems provide a much-reduced warning time for aircraft in the vicinity of wind shear than would TDWR Many aircraft are not required to have such systems, and commercially available systems are lacking for some types of aircraft. The deficiencies of ASR/WSP and on-aircraft wind shear systems are substantial and these systems would not achieve the desired mission. The no-action alternative would also not fulfill the mission.

Section 6. Environment Impact Assessment

The Final EIS evaluates in detail the proposed action and the alternatives described above. The following impact categories were analyzed in the Final EIS to determine the potential for installation and operation of TDWR at the U.S. Coast Guard Air Station Brooklyn site to affect the quality of the human environment:

1. Radio Frequency Radiation (RFR) Effects-TDWR radio emissions will comply by a wide margin with current national safety standards, developed by the American National Standards Institute and included in FAA Order 3910.3A, for exposure of the general public to radio

signals. No health hazards to persons in the vicinity would result.

2. Land Use and Coastal Zone Management-The FAA has determined, and the State of New York concurs, that TDWR at this location will be consistent with the New York State Coastal Management program. Federal regulations do not require the FAA to comply with local zoning law. As such, TDWR is exempt from local zoning regulations. However, New York City has zoned the TDWR site as an "Ml - I" manufacturing district and a radio tower, such as TDWR, is an allowable use in that district.

3. Geology and Soils--The site is level and no significant ground erosion or topographic alteration will be required for TDWR installation

4. Water Resources and Hydrologic Processes--The site is not within a 100-year floodplain does not contain federal-jurisdiction wetlands. TDWR will not generate wastewater during operation and will not result in adverse effects on water quality of Jamaica Bay.

5. Air Quality-TDWR will include a standby generator that will operate infrequently. Air emissions generated by the generator or vehicles used during construction and operation of TDWR will not cause or add to violations of federal or state air quality standards.

6. Flora and Fauna-Adverse impacts will not result on species listed under the Endangered Species or Marine Mammals Acts. The U.S. Fish & Wildlife Service and the National Marine Fisheries Service Concur with that determination.

7. Recreational Resources-The TDWR site is designated by the National Park Service as a nonpark use area within Gateway NRA and no recreational resources will be displaced or significantly affected. The FAA parcel planned for installation of TDWR is wholly surrounded by the property leased to the New York City Police Department and roughly 400 feet south of the helicopter operations area actively used by the New York City Police. The FAA property is only accessible by crossing the police property and access to the police property is restricted to authorized persons only, because of the hazard from helicopter operations as well as the need for security.

8. Section 4(f) properties (i.e. publicly owned park land, recreation area, wildlife or waterfowl refuge, or historic site)-Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303, does not apply to the installation of the TDWR at the former U.S. Coast Guard Station Brooklyn located at Floyd Bennett Field. First, consideration under Section 4(f) is not required because the site was acquired for transportation purposes before the Gateway NRA was designated. [See, 23 C.F.R-Section 771.135(h)]. Second, as the land has been publicly owned for transportation purposes, it is not considered publicly owned for park or recreational purposes within the meaning of Section 4(f). Third, where, as in this location, Federal lands are administered for multiple purposes, the Federal official having jurisdiction over the lands determines whether the subject lands are in fact being used for park, recreation, wildlife, or waterfowl or historic purposes within the meaning of Section 4(f). Although the entire former U.S. Coast Guard property, including the 1. 8 acres owned by the FAA, is technically within the boundaries of the Gateway NRA, the property is one of several portions of the area

which are not in fact being administered or used for park or recreational uses. It is undisputed that the historic use of the land owned by the FAA has been for aviation purposes. This nonpark use is evidenced by the Gateway General Management Plan [NPS, 1976] Which the National Park Service issued to implement the Gateway Act. This Plan expressly indicated that the former U.S. Coast Guard property is designated as a nonpark use area. The 1.8 acres owned by the FAA are within approximately 400 feet of a maintenance apron and active runway used by the New York City Police Department. The New York City Police Department has relocated its helicopter operation to the former U.S. Coast Guard Property under a twenty-five year lease. For security reasons, the New York City Policy Department has continued the restriction on public access and no recreational park visitors have access to the area. Further, because of the security restriction, there are no recreational activities in the vicinity of the FAA property. Therefore, even if Section 4(f) did apply, there will be no actual direct or constructive use of a protected resource under Section 4(f) as a result of the installation of the TDWR at the FAA site.

9. Visual Quality-TDWR will be visible from many local areas but will not be unusual in appearance or overly obtrusive in setting-a former Navy and Coast Guard base now used for helicopter operations by the New York City Police Department.

10. Cultural Resources-The FAA ha determined, and the State Historic Preservation Office (SHPO) and Advisory Council on Historic Preservation (ACHP) concur, that construction and operation of TDWR will not adversely affect historic or cultural resources.

11. Hazardous Materials-All waste materials generated during TDWR construction will be sent to a proper disposal facility as required by the Resource Conservation and Recovery Act.

12. Noise--Noise generated during TDWR construction or operation will not adversely affect sensitive receptors. Installation of the TDWR will not result in any increase in airport capacity at either LGA or JFK Airports. No changes in aircraft flight paths or procedures would result and aircraft noise levels would not be affected.

13. Transportation-During both the construction and operation periods, TDWR would generate a minimal number of vehicle trips and would not adversely affect the level of service of local roads.

14. Energy Consumption-TDWR would consume an estimated 840 kilowatt-hours per day, about the same as 40 typically sized houses. Energy consumption would not exceed the capability of the local service provider.

15. Socioeconomics--TDWR would provide an extremely modest economic benefit to the local economy in the form of expenditures, particularly during the construction period. No substantial growth-inducing effects would result.

16. Environmental Justice--Based on U.S. Census data, the communities surrounding the TDWR site contain lower percentages of minority and low-income populations than Kings County as a whole. No disproportionately high and adverse effects would result on minority or low-income populations or children. Exposure of persons to radiofrequency radiation will comply with applicable

national safety standards. Therefore, there will be no hazards to persons in the vicinity.

The final EIS contains a thorough investigation of these issue areas and determines that no significant environmental impact will result from the installation and operation of TDWR at the U.S. Coast Guard Air Station Brooklyn site (the environmentally preferable alternative.)

The final EIS also compares the proposed action with the alternative actions described above. Installation of TDWR at the preferred site or implementation of any of the alternative actions, with the exception of the no-action alternative, would result in physical changes to the environment and resulting direct and indirect effects on environmental resources. The type and extent of environmental effects would vary considerably among the proposed action and alternatives. The proposed action and each of the alternatives would be compatible with existing and planned land uses and New York City zoning at and near the proposed implementation site. Effects on long-term productivity of the land at the preferred and alternative site would likewise be negligible. Coastal zone policies are applicable to installation of TDWR at the preferred site, Hart Island site, or an ocean site, and installation of ASR/WSP at JFK Airport; each of those options would be consistent with policies set forth in the New York City and State coastal program. In fact each of these options would further the objectives of the local and state coastal programs by benefiting future development of aviation at New York area airports.

Direct physical impacts of TDWR include potential effects on land, water, and air. Clearing of small areas of vegetation would be required if TDWR is installed at the preferred site or Hart Island site. No significant habit would be affected. Soil erosion can be minimized through application of sound

construction practices and would be minor. Installation of TDWR at Hart Island site, an ocean site, or the Ambrose Light site would require burying an underwater utility cable in either Long Island Sound or Lower New York Bay, which could potentially cause temporary adverse effects on water quality. Installation of TDWR at the preferred or alternative sites would result in emissions of minor amounts of dust and diesel exhaust during the construction period and mission of exhaust from the standby generator in the long-term. Those emissions would not cause violations of air quality standards and would be insignificant. Implementation of the other alternatives (i.e., on-aircraft wind shear systems, ASR/WSP, Doppler 4000 data feed to ITWS, or the no-action alternative) would not require clearing of land, would not cause sod erosion, and would have little, if any, impact on air or water quality.

No significant impacts on recreational resources and activities, park land, or historic or archaeological cultural resources would result from implementation of the preferred action. The New York SHPO and the ACHP concur with that determination. In the absence of detailed field surveys at the Hart Island and ocean sites, possible impacts on archaeological resources from construction of TDWR at these alternative sites are not known. Due to a lack of nearby sensitive receptors, noise from construction of TDWR at Hart Island or an ocean site would not cause adverse effects. Noise from construction of TDWR at the preferred site would be audible to persons using portions of Gateway NRA, but because of the distance from the preferred site, would not unreasonably disrupt or prevent recreational activities. TDWR would not dominate views or be visually incompatible with surrounding facilities at the preferred or alternative sites. Visual impacts would be insignificant. The preferred site has been surveyed for the presence of archaeological resources and no evidence of resources was

found. Installation of the underwater utility cables to serve TDWR at Hart Island or Lower New York Bay could affect submarine archaeological resources.

Construction of TDWR or installation of ASR/WSP would result in a minor amount of local construction expenditures. TDWR or ASR/WSP would be unmanned and would be maintained by existing FAA organizations based at JFK Airport. Expenditures to operate TDWR would be greater for an ocean-based TDWR than for TDWR at Hart Island. TDWR at the preferred site or ASR/WSP would be least costly to operate. In any case, operational expenditures would be minor in relation to the size of the local economy. A thorough environmental justice analysis demonstrates that implementation of the preferred or alternative actions would not result in disproportionately high and adverse effects on minorities or low- income communities. Socioeconomic impacts would be insignificant for the preferred and each of the alternative actions.

Transportation needs and energy use would vary greatly among the alternatives. TDWR at an ocean site or at the Ambrose Light site would generate the greatest amounts of traffic (including land, water, and air trips) and consume the most energy during the construction and operation periods. The TDWR ocean platform would also create a collision hazard for vessels sailing in Lower New York Bay. TDWR at the Hart Island site would generate the second greatest amount of traffic and consume the second greatest amount of energy. The preferred site is the most easily accessible of the alternative sites for TDWR. Traffic generation and energy consumption would be less than for TDWR, at Hart Island or at ocean sites. Implementation of ASR/WSP, Doppler 4000 data feed to an Integrated Terminal Weather System (IWS), or the no-action alternative would generate little or no traffic and would consume little or no energy. Installation of on-

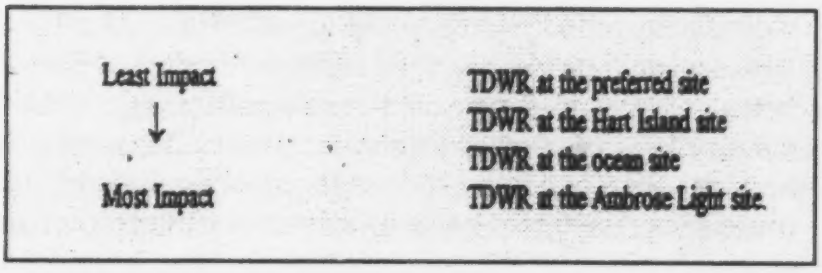
Aircraft wind shear systems would not generate traffic, but would result in consumption of relatively large amounts of energy because of the need to equip many aircraft.

Installation of TDWR at the preferred site would not substantially affect biological resources. Protected species are not present at the preferred site and would not be affected. Installation of TDWR in Hart Island or an ocean site has much greater potential to affect biological resources. In particular, dredging to install the underwater utility cable could harm marine fauna. Coastal wetlands and the biologically productive shoreline areas at Hart Island City Islands would be disturbed if TDWR is installed at Hart Island. The shoreline area at Rockaway Peninsula would be disturbed if TDWR is located in the ocean. The shore terminus for the utility cable serving an ocean-based TDWR could affect important habitat for the rare piping plover and seabeach amaranth. Due to the relatively short height of the TDWR tower and the lack of structural elements that are hard to see, the potential collision risk to birds would be minimal. Installation of on-aircraft wind shear systems or ASR/WSP, implementation of Doppler 4000 data feed to ITWS, or the no-action alternative would not affect biological resources.

The TDWR signal would comply by a wide margin with national and international safety guidelines for exposure of persons to peak and average levels of radio frequency radiation (RFR). Likewise, the TDWR signal would not affect operation of cardiac pacemakers. Based on engineering studies and operation of TDWR at other locations, TDWR would not cause interference with radio or television broadcasts or operation of model airplanes. The TDWR signal is not powerful enough to detonate electroexplosive devices, or affect fuel-handling operations. On-aircraft systems would be smaller and less powerful than

TDWR and would not cause RFR effects on persons or electronic systems or devices. Implementation of ASR/WSP, Doppler 4000 data feed to ITWS, or the no-action alternative would not generate new RFR emissions. RFR effects from implementation of the preferred or any or the alternative actions would be insignificant.

With regard to the potential for effects on the environment, the preferred and alternative actions that could fulfill the required purpose ran be ranked as follows:


Least Impact
Most Impact
TDWR at the preferred site
TDWR at the Hart Island site
TDWR at the ocean site
TDWR at the Ambrose Light site.

The action that would fulfill TDWR's mission with the least environmental impact is installation of TDWR at the U.S. Coast Guard Air Station Brooklyn site, which is the environmentally preferable alternative and the agency's preferred alternative.

Section 7. Mitigation Measures

Based on the extensive studies conducted to date and careful consideration of public input, I find that installation and operation of TDWR at the U.S. Coast Guard Air Station Brooklyn site will not result in significant impacts on the quality of the human environment. The mitigation measures listed below will be implemented to reduce non- significant environmental impacts to negligible levels:

1. To reduce emissions of dust during the construction period, areas cleared of vegetation during construction will be watered periodically. Standard measures to control soil erosion, drainage, and washing of soil away from the site will be employed during the construction period. After construction of TDWR is completed, disturbed areas will be restored to their pre-construction condition to the maximum extent possible. This may require replanting of those areas with suitable native vegetation.

2. Excess soil and groundwater extracted during TDWR construction will be tested for the presence of petroleum products and if found to be contaminated at regulatory action levels, will be removed for proper treatment and disposal at facilities properly licensed to handle and/or accept such waste under Resource Conservation Recovery Act (RCRA) requirements, as required.

3. If potentially significant historic artifacts or human remains are uncovered during site preparation, construction activities will be suspended near the find and the New York SHPO will be contacted to determine the significance of the find. Necessary measures will be undertaken to protect and curate uncovered artifacts as deemed necessary by the SHPO.

4. To reduce noise impacts during the construction period, equipment should be turned off when not in use and construction activities should occur during normal working hours to the greatest extent possible. The TDWR standby generator should be equipped with a critical-grade silencer to minimize long-term noise impacts.

5. The finished floors of all occupied structures will be located at a minimum elevation of 11 feet MSL, which is one foot above the base flood level.

6. A spill prevention, containment and countermeasure plan for the on-site storage of diesel fuel for the standby generator will conform with FAA Order 1050.15A

7. Rewards of all maintenance and operational use of the TDWR standby generator will be maintained for at least five years in accordance with New York State Department of Environment Conservation regulations.

8. With the exception of the L-810 red aviation warning fight at the top of the radome, continuously operating and automatically timed exterior lights at the TDWR site will be shielded to minimize possible adverse effects on nearby uses and to minimize attraction of birds.

9. To enhance visual quality, the concrete masonry unit at the TDWR site will have a facing consistent with the character of neighboring park facilities.

10 The National Park Service, U.S. Coast Guard, and New York City Police Department will be apprised in advance of the schedule for construction activities to minimize the potential for conflicts with non-FAA activities in the vicinity.

11. If deemed necessary by the FAA, the FAA will provide to the New York City Police Department and the U.S. Coast Guard filters for installation on radio

systems operated by those agencies to prevent electromagnetic interference caused by the TDWR radio signal.

12. After the useful fife of the TDWR has ended, the FAA will decommission the system and remove it. The FAA will take the necessary steps, to the extent feasible, to implement a plan to reclaim the site to pre-TDWR condition as described in the EIS.

Section 8. NEPA Coordination and Public and Agency Involvement

The final EIS conforms with legal requirements set forth in President's Council on Environmental Quality *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act* (40 CFR 1500 et *seq.)* and FAA Order 1050. ID, *Policies and Procedures for Considering Environmental Impacts.* A programmatic EIS, prepared in 1991 by the FAA, examined potential environmental effects of the nationwide TDWR program. The final EIS examines potential environmental effects of installing a single TDWR in the New York City area to serve JFK and LGA Airports. The FAA was the lead agency for preparation of the programmatic EIS and the final EIS.

A 135-day scoping period for the final EIS was conducted in January through June 1996, during which written comments on the scope of the EIS were accepted and four official scoping meetings were held in the potentially affected area of New York City. The results of the scoping process are summarized in a Final Scoping Paper, issued by the FAA in August 1996. The technical breadth of the final EIS is consistent with the recommendations of the Final Scoping Paper.

On August 15, 1997, a draft EIS was issued by the FAA and a Notice of Availability was *published in the Federal Register (62 Federal Register 43768).* Display advertisements and legal notices announcing the availability of the Draft EIS and schedule for public hearings were published in local newspapers. Copies of the draft EIS were neared to all parties who participated in the EIS scoping process, all persons who expressed interest to the FAA about the proposed action, and relevant government agencies. The draft EIS was distributed to over 600 persons and organizations. Comments on the draft EIS were accepted through November 21, 1997, a period of 98 days. A total of five public hearings were held in Brooklyn and Queens during the comment period and were attended. Copies of all written comments on the draft EIS received by the FAA and verbatim transcripts of the public hearings are included in the final EIS. All comments received during the comment period were carefully reviewed. The final EIS contains written, responses to all substantive comments received by the FAA, whether submitted in writing during the public comment period or verbally at the public hearings held on the draft EIS.

On January 20, 1999, the FAA issued the final EIS and a Notice of Availability was published in the *Federal Register.* Legal notices announcing the availability of the final EIS were published in local newspapers. Copies of the final EIS were mailed to over 800 persons and organizations. Six comments were received on the final EIS and considered by the Agency prior to making this decision. The attached Appendix presents the agency's responses to those comments.

Copies of the final EIS and this ROD may be obtained by written request to:

Jerome Schwartz
Environmental Lead for TDWR, AND-402
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Section 9. Order

The FAA has broad and pervasive authority in the fields of airspace management and air safety. Congress has authorized the FAA to acquire, establish, improve, operate and maintain air navigation systems such as TDWR (e.g., 49 U.S.C., section 44505). In accordance with that authority, the FAA certifies that a federally funded TDWR is reasonably necessary to enhance the safety of aviation at JFK and LGA Airports.

The FAA conducted a detailed environmental review of this proposed action in conformance with requirements set forth in FAA Order 1050. ID -*Policies and Procedures for Considering Environmental Impacts.* Throughout the EIS process, the FAA provided data used in the technical analysis and reviewed key portions of the analysis prior to incorporating the results into the final EIS. The FAA evaluated the technical feasibility of the proposed TDWR facility and determined which alternatives were acceptable for consideration. As the nation's aviation agency, the FAA has the ultimate technical expertise to develop, evaluate, and select actions and alternatives that will result in safe and efficient use of U.S. airspace. The Final EIS and this ROD represent the best judgment of the FAA in this key area of expertise.

Based on the extensive studies conducted to date and careful consideration of the public input received during the environmental review process, I find that installation, operation and eventual decommissioning of TDWR to serve JFK and LGA Airports at the U.S. Coast Guard Air Station Brooklyn site will not result in significant impacts on the quality of the human environment. The mitigation measures listed in Section 7 above will be implemented to minimize non-significant impacts.

I have carefully considered the FAA's goals and objectives in relation to deployment of the TDWR to serve JFK and LGA Airports, New York City, New York, as discussed and evaluated in the final EIS and ROD. This consideration includes the purpose and need for TDWR, possible alternative sites and technologies, extensive environmental review, and mitigation measures. Under the authority delegated to me by the Administrator of the FAA, I find that TDWR should be installed at the U.S. Coast Guard Air Station Brooklyn site as described in this ROD. The final EIS contains a site-specific analysis of possible environmental effects that could result from installation of TDWR at this site and concludes that significant environmental impacts will not result. Based on careful and thoughtful review of the final EIS and public and agency submissions received during the EIS process, the following factors support the decision to install TDWR at the preferred site, the U.S. Coast Guard Air Station Brooklyn site:

- TDWR at this site will provide highly effective weather-radar coverage of the principal coverage regions and microburst alert warning areas at JFK and LGA Airports

- Construction at this site is highly feasible

- Maintenance requirements of TDWR can be reasonably met at this site
- This site is available for TDWR use
- TDWR will be electromagnetically compatible with nearby electronic system
- The proposed action will be consistent with policies of the New York State Coastal Management Program
- The proposed action will result in no adverse effect on historic resources eligible for or listed on the National Register of Historic Places
- No significant impacts on legally protected species will result
- Implementation of the proposed action will conform with policies for floodplain management and protection of wetlands set forth in Executive Orders 11988 and 11990
- Implementation of the proposed action will conform with policies to prevent disproportionately high and adverse impacts on minority populations, low-income populations, and children set forth in Executive Orders 12898 and 13045
- Implementation of the proposed action will not result in direct or constructive use of properties defined in Section 4(f) of the DOT Act and will conform with policies for protection of parks, recreation areas, wildlife and waterfowl refuges, and historic properties set forth in that section.

- Implementation of the proposed action is consistent with Section 3(e) of the Gateway Act. The proposed site was acquired for transportation purposes before the Gateway NPA was designated and its historical use has been aviation. Installation of TDWR is in accordance with the Gateway *General Management Plan,* issued by the National Park service to implement the Gateway Act. This plan expressly indicates that the entire former U.S. Coast Guard Station Brooklyn, including the 1. 8 acres owned by the FAA, is designated as a nonpark use area.

Therefore, under the authority delegated to me by the Administrator of the FAA, I order that TDWR be installed at U.S. Coast Guard Air Station Brooklyn site. This decision is taken pursuant to 49 U. S.C. Subtitle VII, Part A, and constitutes a final order of the Administrator subject to review by the Courts of Appeal of the United States within 60 days from issuance in accordance with the provisions of 49 U.S. C. Section 46110. This ROD will be sent to those parties who have indicated an interest in this TDWR project. The FAA will publish a notice in the *Federal Register* and legal notices in newspapers of the affected area of New York City announcing this decision and the availability of this ROD.

James C Link

James C. Link
Leader, Integrated Product Team for Surveillance, AND-400

3/24/99
Date

APPENDIX: Responses to Comments on the FEIS

This appendix presents FAA's responses to comments received concerning the FEIS. The comment letters are displayed and addressed in chronological order.

Senator Schumer/Representative Nadler/Representative Weiner letter dated February 9, 1999.

Response: This letter raised three issues: blind spots for the TDWR, findings with regard to the Hart Island alternative, and concerns of the Department of the Interior. These concerns were raised earlier in the EIS process. They are thoroughly addressed in the FEIS at pages 85-88, 93-94, 98-99, 115-118, 123-124, 127, 132, 165, 173-175, 185-190 209-232, 310, 313-316 and 535, and this ROD at pages 3-5, 8, 15, 16 and 21. They are also specifically addressed in the FAA letters dated March 29, 1999 (attached). Senator Schumer and Representatives Nadler and Weiner will receive a copy of this ROD, when issued.

Bourque, New York City Audubon Society letter dated February 20, 1999.

Response: The issues raised in the attached letter were expressed earlier in the EIS process. They are addressed in the FEIS at pages 2, 5-9, 32-35, 45-51, 53-61, 79-84, 96-125, 325-332, 532-538 and Technical Appendices E and F, and in this ROD at pages 2-3, 5, and 6-7. Mr. Bourque was sent a copy of the FEIS and will receive a copy of this ROD, when issued.

Taylor, U.S. Department of the Interior letter dated February 24, 1999.

Response: The issues raised in the attached letter were expressed earlier in the EIS process. They are addressed in the FEIS at pages vii-viii, 14, 39-40, 53-56, 58-60, 65-66, 68, 79, 101-115, 122-123, 125, 209-232, 532-538, and Appendix E-33, and this ROD at pages 3-5, 12-13, and 21. They are also specifically addressed in the FAA letter dated March 18, 1999 (attached). In addition, representatives of the FAA Chief Counsel's Office met with representatives of the Department of Interior's Solicitor to discuss these issues on March 23, 1999. Mr. Taylor will receive a copy of the ROD, when issued.

Hargrove, U.S. Environmental Protection Agency (EPA) letter dated March 3, 1999.

Response: The EPA states that their "concerns have been adequately addressed" in the FEIS. They continue "we have concluded that the proposed project would not result in significant adverse environmental impacts; therefore, EPA has no objections to its implementation." The EPA will receive a copy of this ROD, when issued.

Kiernan, National Parks and Conservation Association letter dated March 10, 1999.

Response: The issues raised in the attached letter were expressed earlier in the EIS process. They are addressed in the FEIS at pages vii-viii, 14, 39-40, 53-56, 58-60, 65-66, 68, 79, 101-115, 122-123, 125, 209-232, 532-538, and Appendix E-33, and in this ROD at pages 3-5, 11-14, and 17-18. Mr. Kiernan was sent a copy of the FEIS and will receive a copy of this ROD, when issued.

Sewell, Natural Resources Defense Council letter dated March 10, 1999.

The issues raised in the attached letter were expressed earlier in the EIS process. They are addressed in the FEIS at pages vii-viii 14, 35-37, 39-40, 53-56, 58-60, 65-66, 68, 79, 101-1 15, 122-123, 125, 209-232, 532-538, and Appendix E-33, and in this ROD at pages 3 -5, 8, 11-14, 15, 16, 17-18 and 21. Mr. Sewell was sent a copy of the FEIS and will receive a copy of this ROD, when issued.